Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
October Term, 1998

AVR, INC.,
a Minnesota Corporation,

Petitioner,

v.

CITY OF ST. LOUIS PARK,
a Minnesota Municipal Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a lawful non-conforming use, not considered a nuisance or prohibited by any precepts of property law, can be terminated through amortization, without payment of just compensation under the Fifth Amendment of the United States Constitution.

THE PARTIES

Petitioner is a Minnesota Corporation.
Respondent is a Minnesota Municipal Corporation.

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Petitioner respectfully asks that the Writ of Certiorari be issued to review the decision of the State of Minnesota Court of Appeals filed on October 20, 1998. Discretionary review was denied by the Minnesota Supreme Court in an Order filed on December 15, 1998.

OPINIONS BELOW

The Minnesota Supreme Court's Order denying review of the Minnesota Court of Appeals' decision is unreported but is included herein at App. A-73. The decision of the Minnesota Court of Appeals is reported at 585 N.W.2d 411 (Minn. Ct. App. 1998) and is included herein at App. A-56 through App. A-72.

The Order Granting Respondent's Motion for Summary Judgment; Order Dismissing Petitioner's Complaint of the State District Court (Hennepin County, Minnesota) is not reported but is included herein at App. A-1 through App. A-48.

JURISDICTION

The Minnesota Supreme Court's Order denying review of the Minnesota Court of Appeals' decision was filed on December 15, 1998. The United States Supreme Court has jurisdiction to review the Minnesota Court of Appeals' decision by Writ of Certiorari pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case involves the City of St. Louis Park's adoption of an ordinance terminating Petitioner's lawful use of its property to house a ready-mix concrete plant. The prohibition came in the form of a two year amortization period. The 2.6 acre parcel is surrounded by commercial and light industrial uses. App. A-3.

The plant was originally constructed in 1954, and became a legal, non-conforming use in 1959 when the City adopted an ordinance requiring a special use permit for ready-mix plants in an industrial zoning district. The ordinance also provided that no special permits could be granted if a plant were within 400 feet of a residential district. While the Petitioner's property was zoned industrial, it was located within 400 feet of a residential district. App. A-3.

In 1973, the City adopted an extensive amendment to its existing zoning ordinance. The 1973 amendments eliminated 29 industrial uses (including ready-mix plants) in any district within the City. Petitioner purchased the plant in 1974. App. A-3.

Petitioner challenged the 1973 zoning ordinance. The Minnesota Court of Appeals voided the ordinance as it pertained to the Petitioner's plant, and ruled that Petitioner was permitted to fully operate its ready-mix facility as a legal pre-existing, non-conforming use. *See Apple Valley Red-E-Mix v. City of St. Louis Park*, 359 N.W.2d 313, 315 (Minn. Ct. App. 1984). Petitioner continued to operate, repair and maintain its plant. App. A-4.

In 1984, the City brought criminal charges against Petitioner alleging a violation of its air pollution and public nuisance ordinances for allegedly emitting cement dust. The Minnesota Court of Appeals struck down the City's

ordinance under which Petitioner was charged because the ordinance set more stringent air quality standards than those in the Minnesota Pollution Control Act. *See State v. Apple Valley Redi-Mix, Inc.*, 379 N.W.2d 136, 139 (Minn. Ct. App. 1985). App. A-5.

In 1991, the City filed a complaint against Petitioner charging Petitioner's plant as a nuisance, alleging violations of noise limitations under the City's ordinances. The Minnesota District Court dismissed the City's complaint. App. A-5

In 1990 and 1991, the City's Planning Commission and City Council held public hearings on City-wide amendments to the City's Comprehensive Guide Plan. Termination of certain non-conforming uses using amortization was considered. The Planning Commission reported that approximately 200 non-conforming uses would be terminated as a result of amortization. The City later reduced to 66, the number of non-conforming uses to be subject to the proposed amortization. The remaining uses were either multi-family residential uses or non-residential in nature. The number of non-conforming uses proposed to be terminated was later reduced to three properties, the Petitioner's plant, an auto-salvage yard, and a bar. Eventually the number of non-conforming uses subject to amortization was reduced to one: the Petitioner's plant.

In 1992, the City adopted a Comprehensive Zoning Ordinance. Section 14-7-4 of the Ordinance, which relates to the amortization on non-conforming uses, provides in relevant part:

> The Council may by ordinance amend the Zoning Ordinance to establish an amortization period for individual land uses not permitted in the City. The amortization period shall commence upon

publication of the Ordinance establishing the length of the amortization period.

App. A-6 to A-7. Again, the Petitioner's plant was the only use to be terminated. The Ordinance also included the rezoning of Petitioner's property to multi-family residential.

Following hearings before the City Planning Commission and the City Council, the City again amended its Zoning Ordinance, specifically to adopt a two year amortization period for Petitioner's plant. The Ordinance provided in relevant part:

> The reasonable amortization period applicable to the ready-mix facility owned and operated by Apple Valley Red-E-Mix at 3270 Gorham Avenue South, St. Louis Park, Minnesota, shall be two years, commencing upon the publication of this Ordinance.

App. A-7 to A-8.

On October 2, 1995, the City Council adopted the Ordinance. The effective date of the Ordinance was October 11, 1995, with the Petitioner's plant scheduled to close on October 11, 1997.

The City submitted no empirical or objective evidence, whether by expert or otherwise, sustaining any finding that Petitioner's plant created excessive noise, traffic, or dust, or that the Petitioner's plant was a nuisance or constituted a noxious or harmful use. The two year period was based for the most part on the City's conclusion that the Petitioner had recouped its investment in the subject property since Petitioner purchased the property in 1974. App. A-67. The City produced no measurement of the noise or dust emitted from the plant, but instead relied solely on complaints from

residents of one condominium complex built in the early 1980's across the street from the plant. App. A-8 to A-9.

Petitioner, on the other hand, produced several experts and submitted evidence regarding the denial of the use of the property, life of the plant, harm to the Petitioner's business if the plant closed, climatological data (thwarting the neighbors concerns about dust), the harmless nature of the plant's operation, surrounding uses, and, amongst other evidence, the fact that the property would not be ripe for redevelopment for several years. The City confirmed that there was no redevelopment plan for the property or the surrounding area. App. A-27 to A-28.

By agreement between the parties, the closure of the Plant was stayed while the Petitioner challenged the amortization. By order of the State District Court, the plant closed on February 13, 1999.

Petitioner filed suit against the Respondent on December 22, 1995. After cross motions for summary judgment, the Minnesota District Court granted the City's motion for summary judgment by order entered February 20, 1998. After reviewing the evidence, the District Court concluded that the City had not acted in an arbitrary, capricious or unreasonable manner, and that the amortization of the plant did not constitute a taking of Petitioner's property.

The Petitioner appealed the District Court's decision to the Minnesota Court of Appeals. By a published opinion filed October 20, 1998, the Minnesota Court of Appeals affirmed the District Court's decision. *See AVR, Inc. v. City of St. Louis Park,* 585 N.W.2d 411 (Minn. Ct. App. 1998). App. A-56 to A-72. Petitioner's Statement of the Issues to the Minnesota Court of Appeals included facial and as-applied constitutional challenges including that the City's adoption of a two year amortization period was a violation of

the Petitioner's constitutional rights to due process, equal protection and constituted a taking of property without just compensation. App. A-53 and A-62.

The evidence submitted to the District Court (as reviewed by the Minnesota Court of Appeals) was the record before the City at the public hearings before the Planning Commission and City Council. There was no additional evidence submitted, as pursuant to *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988), the parties were prevented from augmenting the record.

On appeal, the Minnesota Court of Appeals affirmed the District Court's decision. [1]

The Fifth Amendment taking claim was raised by Petitioner in its complaint and as an issue on appeal. App. A-53 and A-62. Both the District Court and the Minnesota Court of Appeals reviewed the takings claim in their analysis that the two-year amortization period had not extinguished

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[1] An issue before the District Court and the Minnesota Court of Appeals was the reasonableness of the amortization period and whether the termination over a certain period of time constitutes a taking. The basis of the Minnesota Court of Appeals' analysis was the case of *Naegle Outdoor Advertising Company v. Village of Minnetonka*, 162 N.W.2d 206 (Minn. 1969). The plaintiff in *Naegle* facially challenged a billboard amortization ordinance as an unconstitutional taking without just compensation. In determining the constitutionality of the ordinance, the Minnesota Supreme Court concluded: "if the value of the plaintiff's property interest was extinguished before the running of the three-year period, there would be no taking, or if the value of freedom from new competition from the statutory period equaled the value of the property interest remaining at the end of the period, there would be just compensation for the taking." *Naegle*, 162 N.W.2d at 213. The Minnesota Supreme Court's constitutional analysis in *Naegle* was simple. If the ordinance artificially cuts short the useful life of the billboard, just compensation was required; and if no useful life remained, no just compensation was required. Concluding that the petitioner had recouped its initial investment in the subject property, the Minnesota Court of Appeals determined that the amortization did not effect a taking. *Id.*

the useful life of the plant (as both courts defined that term). According to the courts, had useful life remained, compensation for a taking was required. App. A-34 to A-42 and A-65.

REASONS FOR GRANTING THE PETITION

This Court has held that a regulation effects a compensable taking under the Fifth Amendment if it "does not substantially advance legitimate state interests [citations omitted] or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980) and *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

Insight into the application of the *Agins* test has recently been provided by this Court in *Lucas v. South Carolina Coastal Council* 505 U.S. 1003 (1992) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Lucas*, the Court clarified the principle that unless the use of property is prohibited by law or limited by precepts of property law, a taking occurs if the *Agins* test is satisfied. Here, in spite of the fact that Petitioner's plant was held not to be a nuisance or create any public harm, it was summarily terminated. The period of amortization was based in large part on recoupment of Petitioner's investment in the property. The result is denial of the Petitioner's use of the property (at least until redevelopment of the surrounding area)[2] and a regulation that does not substantially advance a legitimate state interest – as that concept is defined in *Nollan* and *Dolan*.

This Court has not had the opportunity to address amortization of non-conformities. This case provides the opportunity to address how summary termination of "non-noxious uses" fits in the paradigm enumerated in *Lucas*.

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[2] Petitioner's property will not be the subject of redevelopment for several years. App. A-28. Petitioner submitted uncontroverted evidence to the City that the property was too small to develop as a residential use.

THE MINNESOTA COURT OF APPEALS' DECISION ALLOWING TERMINATION OF A LAWFUL USE OF PROPERTY FUNDAMENTALLY ALTERS THE CONSTITUTIONAL RIGHT TO JUST COMPENSATION RESULTING FROM A TAKING OF PROPERTY.

The Minnesota Court of Appeals' decision upholding amortization of the plant without compensation (based on recoupment of investment), where the plant was lawfully operating, was not limited by precepts of property law and did not create a nuisance or cause public harm, ignores this Court's current statement that when a regulation goes "too far" it becomes a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This fundamental change in regulatory taking jurisprudence will allow the summary termination of any non-conformity without compensation.

Review of the application of the Fifth Amendment to land use regulation has been approached by this Court on an ad hoc factual basis:

> Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in... essentially ad hoc, factual inquiries."

Lucas, 505 U.S. at 1015 (citing *Penn. Central Transp. Co. v. City of New York*, 438 U.S. (1978)). This Court has wisely chosen cases which will provide further insight on the

parameters of the Fifth Amendment as it relates to regulatory takings. This is another opportunity.

The United States Constitution affords property owners rights equal to personal liberties. This Court has long recognized a property owner's rights:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal right," whether the "property" in question be a welfare check, a home, or a savings account. In fact, fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.

Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972). The protection of property rights arises out of the Fifth Amendment. This Court has painstakingly defined when, on the spectrum of property regulation, a regulation justifies compensation under the Fifth Amendment. In *Lucas*, the Court concluded:

> Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interest included in the ownership of property was necessarily constrained by constitutional limitations. 260 U.S., at 414-415, 67 L. Ed. 322, 43 S. Ct 158, 28 A.L.R. 1321. If, instead, the uses of private

> property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415, 67 L. Ed. 322, 43 S. Ct. 158, 28 A.L.R. 1321. These considerations gave birth in that case to the oft-sited maxim that, "while property may be regulated to a certain extent, if regulation goes to far it will be recognized as a taking."

505 U.S. at 1014. The Court again in *Dolan* recognized the importance of the Takings Clause as it related to other amendments included in the Bill of Rights:

> We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

512 U.S. at 392. Insight into the determination of at what point regulation has gone "too far" has been reviewed by this Court on several occasions in the past two decades. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Agins v. Tiburon*, 447 U.S. 255 (1980); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Nollan v. California Costal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigar*, 512 U.S. 374 (1994).

This case directly presents the issue of whether an immediate termination of a viable, lawful land use constitutes a compensable taking under the Fifth Amendment of the Constitution. While planning authorities have used amortization as a means to eliminate non-conformities since the 1950's, state and federal courts vary on the constitutional impact on the property owner. The regulation of the Petitioner's property in this case is far more significant than the regulation of the property owner in *Dolan* (a building permit conditioned upon dedication) or *Nollan* (a building permit conditioned upon granting a public easement). In both of those cases, this Court accepted Certiorari, in part, to determine whether a taking existed as a result of the conditions to the approvals. Here, the ongoing use of Petitioner's property was terminated. The Minnesota Court of Appeals' departure from current regulatory taking jurisprudence must be rectified.

The Takings Clause of the Fifth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), states: "[n]or shall private property be taken for public use without just compensation." The principal purpose of the Takings Clause is "to bar government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In this case, had the City, after 20 years of failed attempts to eliminate Petitioner's plant, commenced eminent domain proceedings under relevant state statues, Petitioner would have faced a physical taking and received just compensation. The City, on the other hand, to avoid paying Petitioner for its property, terminated the Petitioner's plant, forcing the Petitioner to hold the property without any

economically viable use (at least until the property and the surrounding property are ripe for redevelopment). The plant cannot be converted to another use.

The issue presented in this Petition naturally follows previous regulatory takings cases as well as provides equally important insight into when and under what circumstances a regulation effects a taking. The Petition presents the Court with a question that has never been before the Court. Specifically, this Petition gives the Court the opportunity to decide whether a regulation, immediately terminating a viable, legal, non-conforming use, denies a property owner all present economic use of its property, and constitutes a taking. This case provides an extraordinary circumstance in that one property owner (one of 200 non-conformities within the City) is forced to carry the burden of the entire City, requiring Petitioner to "carry with [it] a heightened risk that [its] private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1018.

The City's termination of Petitioner's plant conflicts directly with the Court's holding in *Lucas*. In *Lucas*, the Court clarified the age old precept that "harmful or noxious" uses may be proscribed by government without the requirement of compensation. *Id.* at 1022. *Lucas* confirmed that the "noxious use logic [could not] serve as a touchstone to distinguish regulatory 'takings' – which require compensation from regulatory deprivations that do not require compensation." *Id.* at 1026. To do so, the Court concluded, would "nullify *Mahon's* affirmation of the limits to the noncompensable exercise of police power." *Id.* Here, the Petitioner's plant was specifically held not to be a noxious or harmful use, but was terminated because the Minnesota Court

of Appeals held that recoupment of investment was sufficient to determine whether a taking occurred.

Prohibiting, limiting or eliminating a land use, not otherwise allowed under law or not part of the owner's title, will not justify compensation under the Takings Clause. This concept was clarified in *Lucas*:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. [footnote omitted] This accords, we think, with our "takings" jurisprudence which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of its property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

Id. at 1027 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413). Thwarting the South Carolina Supreme Court's conclusion that compensation is not required because of its finding regarding Lucas's alleged unlawful use of his property, the Court concluded:

> Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends and the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing. [footnote omitted]

Id. at 1031-32. Short of prohibition by other means, a regulation that denies the property owner all economically viable use, or that does not substantially advance a legitimate state interest, is a taking.

This case directly conflicts with *Lucas* because, in spite of the fact that Petitioner's plant was in use for several years (not a use to be prohibited) and the City failed on two occasions to find the plant a nuisance, the Minnesota Court of Appeals, ignoring federal taking jurisprudence (explicitly that in *Lucas*), held that the Fifth Amendment to the Constitution did not afford the Petitioner compensation. That decision is a far departure from the current state of the law. This Petition should be granted to guide courts, property owners and planning authorities as to if and when amortization effects a taking. Allowing immediate amortization of a lawful use based on recoupment of investment will have a wide impact. It is hard to imagine a non-conforming use that has not already recouped its investment.[3]

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[3] Following the Minnesota Court of Appeals decision, one can conclude that a ready-mix plant less profitable will have more time to operate.

This Petition affords the Court an opportunity to expand and clarify the holding in *Lucas* to determine if the immediate termination of a lawful use constitutes a compensable taking, whether permanent or temporary.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to rectify the departure from regulatory takings jurisprudence raised by the Minnesota Court of Appeals' decision.

Respectfully submitted,

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City of St. Louis Park Ordinance A-74

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

AVR, Inc.,
a Minnesota corporation,

Plaintiff,

v.

City of St. Louis Park.

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; ORDER DISMISSING PLAINTIFF'S COMPLAINT

File No. AP 96-182

The above-entitled matter came on for hearing before the undersigned judge of district court, on the 6th day of August, 1997, upon cross-motions for summary judgment.

Wm. Christopher Penwell, Esq., and Anthony J. Gleekel, Esq., appeared on behalf of plaintiff; Roger N. Knutson, Esq., and Thomas M. Scott, Esq., appeared on behalf of defendant.

Upon all the files, memoranda, the argument of counsel and the court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. That defendant's motion for summary judgment is granted.
2. That plaintiff's motion for summary judgment is denied.
3. That plaintiff's Complaint is dismissed.
4. That the attached Memorandum be made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 15th day of January, 1998.

BY THE COURT

_____

Peter Albrecht
District Court Judge

MEMORANDUM

STATEMENT OF FACTS

This action represents the latest of many attempts by defendant City of St. Louis Park to terminate the operation of plaintiff's ready-mix facility.[1] Defendant St. Louis Park is an inner ring suburb of Minneapolis with approximately 43,000 residents. Plaintiff Apple Valley Redi-Mix ("AVR"), which was constructed in 1954, sits on a 2.6 acre parcel at 3270 Gorham Avenue in St. Louis Park. The plant is located just to the north of Highway 7 and Louisiana Avenue.

In 1959, the City of St. Louis Park enacted a zoning code which provided, in part, that a ready-mix plant would be permitted in an industrial zone only if it obtained a special use permit. The code provided further that the city would not grant a special use permit if the facility were located within 400 feet of a residential district. The ready-mix facility is located within 400 feet of a residential district; the City refused to grant a special use permit. Thereafter, the facility was classified as a preexisting nonconforming use.

In 1973, the City adopted an amendment to the zoning code which implemented changes in policy and industrial land use designation. The ordinance eliminated 29 industrial uses that previously had been permitted in the City, including a ready-mix and concrete block plant. Plaintiff purchased the plant in 1974, for $260,000.00, when it was already a nonconforming use under the City's zoning ordinance.

In 1980, the City adopted a new Comprehensive Plan. Plaintiff was put on notice that the City intended to phase out the ready-mix plant.[2]

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[1] Much of the early history of the dispute between the parties is set forth in Apple Valley Red-E-Mix v. City of St. Louis Park, 359 N.W.2d 313 (Minn. Ct. App. 1984).

[2] The 1980 Plan provided, in part:

In May 1981, AVR engaged in activities at the plant which were characterized by the City as "improvements." On November 6, 1981, the City and AVR entered into a stipulation which would have allowed Red-E-Mix to complete the improvements, and, if AVR's operation was held to be a nonconforming use, to vacate the premises within six years. AVR repudiated the agreement.

AVR brought a declaratory judgment action seeking a determination that the 1973 zoning ordinance was invalid, because it eliminated ready-mix plants as a permitted use in industrial zones. The trial court agreed with AVR. Its decision was affirmed, as modified, by the court of appeals.[3]

> A commercial area is projected at the southeast corner of Oak Park Village located on the west side of Louisiana Avenue north of Highway 7. This site could serve as a convenience retail and service center or office-type development could be considered. Drive-in type facilities, fast food restaurants, car washes, and other similar uses would not be allowed at this location.
>
> Commercial use is designated on the north side of Walker at Republic and Gorham Avenues where both commercial and light industrial uses exist, offering opportunity for smaller businesses which are characteristically found near downtown areas but which do not involve outside storage.
>
> No expansion of commercial or industrial type uses is proposed on Louisiana Avenue, Browndale, or Gorham north of Lake Street.
>
> Heavy industrial uses including a concrete ready mix plant and outdoor storage of heavy equipment are to be phased out, and the sites are to be used for commercial, office, or possibly as a second choice high density rental use.

Ex. 25 at 17-11 - 17-12.

[3] On appeal, the City sought to litigate an issue that was not presented to the trial court; that is, whether AVR's expansion plans violated the code provisions which prohibit the expansion of nonconforming uses.

In 1984, in a criminal complaint the City charged AVR with violating its air pollution and public nuisance ordinances by allegedly emitting cement dust. The trial court dismissed the charges against Redi-Mix, because the ordinances at issue conflicted with the Minnesota Pollution Control Act, Minn. Stat. § 116.01-.45 (1984) and were therefore invalid.[4]

In December of 1991, the City of St. Louis Park filed a complaint in which it charged AVR with ten counts of violating noise limits (§ 11-509(4)) and one count of making unnecessary noise (§ 12-703).[5] The charges originated with complaints from people who lived across the street from the plant in an area zoned residential. Neighbors alleged that AVR's employees had violated the prohibition against making

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[4] The trial court's dismissal of the charges against AVR was affirmed by the court of appeals. It wrote:

> [T]he question is whether the ordinances in issue forbid what the statute permits. The ordinances do not describe any quantifiable air quality standard. The ordinances could set a more stringent air quality standard than the Minnesota Pollution Control Agency. . . . St. Louis Park could very well prosecute under its ordinances a party who is in compliance with the standards set forth in MPC Act. This conflict renders the ordinances in issue invalid.

State v. Apple Valley Redi-Mix, Inc., 379 N.W.2d 136, 139 (Minn. Ct. App. 1985).

[5] § 11-509(4) Operational Limits for Various Sound Sources. No person shall engage in, permit or allow construction activities involving the use of power equipment, manual tools, movement of equipment, or other activities resulting in noise pollution at any time other than between 7:00 a.m. and 10:00 p.m. on weekdays and 9:00 a.m. and 10:00 p.m. on weekends and holidays.

§ 12-703 Making Unnecessary Noise. No person in any public or private place, shall make, or assist in making, by any manner or means, any loud, unpleasant or raucous noise or odor disturbing to others unless the same be reasonably necessary to the preservation of life, health, safety, or property.

loud noises before 7:00 a.m. By Order dated May 7, 1992, this court dismissed the Complaint against AVR:

> The problem with [City of St. Louis Park's] ordinances in question is that by their very vagueness (an issue in and of itself, not reached by this Court) they set a standard that may well be more stringent than the statute. There is therefore an irreconcilable conflict between the two, and [AVR's] motion must be granted.

Order at 3.

In 1992, defendant City of St. Louis Park adopted a Comprehensive Zoning Ordinance. Section 14:7-4, which relates to the amortization of nonconforming uses, provided:

> Council shall by ordinance amend the Zoning Ordinance to establish an amortization period for individual land uses not permitted in the City. The amortization period shall commence upon publication of the ordinance establishing the length of amortization period.

Ex. 28.

Section 14:7-4.1, which related specifically to the amortization of plaintiff Apple Valley Red-E-Mix, provided:

> The reasonable amortization period applicable to the ready-mix facility owned and operated by Apple Valley Red-E-Mix at 3270 Gorham Avenue South, St. Louis Park, Minnesota shall be two (2) years, commencing upon publication of this ordinance. At the conclusion of the two-year amortization period,

> Apple Valley Red-E-Mix's nonconforming ready-mix use shall terminate and cease to operate. In accordance with Minnesota Statutes Section 462-362 and St. Louis Park Ordinance Code Section 14:8-7.1, this section shall be enforceable by mandamus, injunction, or any other appropriate remedy in any court of competent jurisdiction.

Id.

In conjunction with its adoption of the 1992 zoning ordinance and the amortization of AVR, the City made extensive findings.[6] Plaintiff, through its attorneys and other

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[6] The city's findings are contained in Ex. 66:

> A. Concrete Plants.
>
> 53. The City Council finds that Apple Valley Red-E-Mix at 3270 Gorham is a concrete plant and herein restate and incorporate Findings 1 to 52.
>
> 54. The City Council finds the City will realize significant benefits from terminating concrete or ready mix plants in the City after a reasonable amortization period. The benefits, among others are:
>
> a. Residential neighbors will not be disturbed or annoyed by the noise generated by the concrete plant and trucks that haul materials to and from the concrete plant.
>
> b. The City's Police Department and Inspections Department will not receive telephone calls from the residents of 3300 Louisiana Avenue complaining about dust and noise from Apple Valley Red-E-Mix will be eliminated. (sic)
>
> c. Heavy truck traffic which causes excessive wear and tear on the City's streets will be eliminated. The City will have to spend less time and fewer resources cleaning the street.
>
> d. Problems resulting from dirt, grit and particles from the cement plant settling on the streets cause City Staff to sweep

consultants, actively participated in the 1992 zoning ordinance process, which established the amortization procedure. The 1992 Zoning Ordinance required a owners of nonconforming property to register the use with the city no later than December 31, 1993. The submission of plaintiff AVR was accepted as substantially complete on June 29, 1995. The City Council and Planning Commission held a joint public hearing on July 11, 1995, for the purpose of

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routinely the streets. This problem and its associated costs will be eliminated.

e. Eliminating a use that is not permitted anywhere within the City promotes the City goal to promote and protect against depreciation in residential property values.

f. Eliminating Apple Valley Red-E-Mix will promote the quiet peace and enjoyment of the residents living at 3300 Louisiana Avenue.

g. The aesthetics in the neighborhood will improve by eliminating the existing cement plant.

55. The burden on owners of Apple Valley Red-E-Mix are:

a. Apple Valley Red-E-Mix may have to relocate its mixing equipment, if in its judgment, it is cost effective to move an old plant.

b. Apple Valley Red-E-Mix may experience a temporary loss of income during the relocation of its St. Louis Park facility unless cement orders from the St. Louis Park facility are filled by other Apple Valley operations.

56. The City Council finds that the process and procedures established in the Zoning Ordinance relating to establishment of an amortization period are adequate to assure Apple Valley sufficient time to recover its economic investment will be provided in the structures and machinery on its property used in connection with its cement plant operation.

Ex. 66 at 11-12.

adopting an amortization ordinance relating to the AVR facility. At this meeting, the city presented its report and recommendation. AVR's attorney, vice president and planner made oral presentations and submitted documents to bolster its position that the AVR plant has an indefinite remaining physical life. City Record, Ex. 39 at 38-115.

The Planning Commission next considered the proposed amortization of the AVR facility at its regular meeting on August 2, 1995. City Record, Exs. 21 and 40, including a Supplemental Staff Report and documents. City Record Exs. 14-18 and 49. The Committee considered all testimony and submissions related to the proposed amortization submitted prior to and at the meeting by AVR, as well as additional written comments submitted by members of the public. The Planning Commission recommended to the City Council that a reasonable amortization period for the AVR facility was two years. City Record, Ex. 40 at 101-02.

At a special meeting on September 13, 1995, the City Council was presented with an additional staff report, received additional testimony and written submissions and considered the proposed AVR Amortization Ordinance based upon all of the facts, submissions and testimony in the record. The Council approved the first reading of the AVR Amortization Ordinance and directed staff to prepare findings of fact for final action at the time of the second reading of the ordinance.

On October 2, 1995, the City Council adopted the AVR Amortization Ordinance. The effective date of the Ordinance was October 11, 1995, with the AVR plant scheduled to close on October 11, 1997.

In conjunction with adoption of the AVR Amortization Ordinance on October 2, 1995, the City Council adopted Resolution No. 95-131 (City Record, Ex. 42 at 3-5) which contained the following Findings of Fact supporting its two-year amortization determination:

FINDINGS OF FACT

1. The purpose of the City's ordinance providing for the amortization of nonconforming uses, as stated in St. Louis Park Code of Ordinances Section 14:7-4A is as follows:
St. Louis Park is a fully developed City and as such, there are certain uses which are no longer compatible with the nature of the community. In general, these uses tend to create noise, traffic, and dust problems and have a negative impact on property values and aesthetics due to the fact that they are incompatible with the surrounding area. It is the intent of the City to gradually eliminate those uses which because of their location or manner of operation, create a negative impact on the health and welfare of the neighborhood in which they exist. To the extent practical and consistent with good land use planning and zoning principles, the City has made every effort to accommodate permitting uses in districts where they are less likely to cause negative impact.

In reaching its conclusion to provide for the gradual elimination of all nonconforming uses not permitted in any zoning district in the City, the City Council has weighed the interests of the individual property owners who will be required to gradually terminate their nonconforming use and the health, welfare and safety of the community generally and the surrounding neighborhoods specifically.

2. With respect specifically to AVR, the City Council made ten specific findings in connection with the adoption of the City's comprehensive zoning ordinance in 1992 as to the operation of the AVR facility and application of the Amortization Ordinance to that facility.

3. The Minnesota Supreme Court has directed, in the Naegele Outdoor Advertising Co. of Minnesota v. Village of Minnetonka decision, that any amortization period must be "reasonable." Courts in other jurisdictions have identified at least seven (7) factors by which the reasonableness of an amortization period may be evaluated. The St. Louis Park Code of Ordinances incorporates those specific factors in its Amortization Ordinance. The City's Amortization Ordinance specifies that the following factors must be considered in determining the length of an amortization period:

(1) Information relating to the structure located on the property;

(2) Nature of the use;

(3) Location of the property in relation to the surrounding uses;

(4) Description of the character of and uses in the surrounding neighborhood;

(5) Cost of the property and improvements to the property;

(6) Benefit to the public by requiring the termination of the nonconforming use;

(7) Burden on the property owner by requiring the termination of the nonconforming use;

(8) The length of time the use has been in existence; and

(9) The length of time the use has been nonconforming.

4. The Minnesota Supreme Court has approved, in the Naegele decision, the use of amortization as a procedure for the elimination of the nonconforming use, and the City has exercised its discretion consistent with a reasonable application of the law and after due consideration of the evidence relating to the factors set forth in paragraph 3.

Factor (1): Information relating to the structure located on the property.

5. There are two structures located on the AVR property associated with the ready-mix operation, including an industrial shed (garage and shop) and the batching plant. The construction type of both structures is industrial steel and masonry, and both structures have steel exterior walls [on] which rust is evident. The industrial shed measures 133.55' x 60', with 8,013 square feet of floor area. (The floor area of the batching plant is in dispute. City Assessor's records show that the batching plant has 1,417 square feet of floor area, while AVR's appraisal states that the batching plant has 3,506 square feet of floor area. This dispute does not appear to be material for purposes of the amortization period established herein.)

6. AVR proposed in 1986 to completely replace the existing two structures with what it characterized as a "state of the art" ready-mix plant. The city denied AVR's request as a violation of its City Code, because the City Code prohibited the expansion or intensification of a nonconforming use.

Factor (2): Nature of the use.

7. The AVR facility manufactures ready-mix concrete by mixing aggregate that is trucked from the Apple Valley gravel pit and loaded into the cement mixer by conveyer belt, where it is mixed with cement, fly ash, and water before being loaded into cement mixing trucks for transportation to construction sites.

8. The batching plant includes a gravity flow tower that is approximately 60-70' tall and is highly visible from the surrounding residential neighborhood. The buildings do not meet the City's current architectural standards for any Zoning District, even the industrial zoning districts, due to the unfinished steel exteriors on the structures. As the steel continues to rust, the aesthetics will continue to decline, resulting in a potential diminution of the value of the surrounding property.

9. The ready-mix use cannot be conducted within an entirely enclosed building and high volumes of heavy truck traffic delivering aggregate from the gravel pit and transporting ready-mix to construction sites are a necessary part of the use. The noise, dust, traffic, and other features incident to the ready-mix operation are thus largely unavoidable while the facility is operating. Those features conflict and are incompatible with residential uses, including the residential properties immediately adjacent to and across from the facility.

10. Testimony from residents indicated substantial noise generated by the facility which may result from cleaning of trucks or aggregate being unloaded as well as Saturday noise. AVR acknowledged that processing begins as early as 6:00 a.m. and submitted information at the request of City Staff

that Saturday operations at the AVR St. Louis Park Facility have increased in the last five years, with the Facility operating 25% of all Saturdays in 1994 and 50% of the Saturdays during the months of June and July when residents most want to enjoy their patios or have windows open.

Factor (3): Location of the property in relation to surrounding uses.

11. The neighborhood that includes AVR has changed substantially since the ready-mix plant was constructed in 1954. At that time, the area was zoned for industrial uses and was much more industrial in character than it is today. Redevelopment in the area since 1954, and even since AVR's acquisition in 1974, has been substantial and consistent with the City's Comprehensive Plan and zoning policy direction.

12. The facility became a nonconforming use on or about February 5, 1960, the effective date of a new zoning ordinance. Under the 1960 ordinance, ready-mix and concrete block plants were permitted in the I-1 Industrial Use Zoning District only (1) by special permit and (2) only if the plant was located more than 400 feet from any residential use. The facility was located within 400 feet of a residential use to the east and, thus, AVR did not meet the criteria for a special use permit.

13. At present, the area that includes AVR is in the process of redeveloping, and the ready-mix facility is now surrounded by Residential and Commercial Use Districts that contain the Park Tavern Restaurant, the "3300 on the Park" condominium complex, the Oak Park Village townhomes, and a single-family neighborhood that includes a small City park and a public library. In addition, redevelopment plans for the

areas immediately surrounding AVR emphasize construction of additional multiple-family residential housing.

14. The ready-mix use is fundamentally incompatible with existing and planned uses and with the City's zoning and Oak Hill Neighborhood Comprehensive Plan.

Factor (4): Description of the character of and uses in the surrounding neighborhood.

15. AVR is surrounded by a stable single-family residential neighborhood to the east, three businesses of primarily office or quasi-industrial character to the north, none of which apparently involve industrial activity similar to AVR's use and in any event do not involve outdoor processing activities; a vacant building that formerly was used by a security company, immediately to the south; a multiple-family residential neighborhood to the west across Louisiana Avenue; and, to the southwest a restaurant that serves both the single-family residential neighborhood to the east of AVR as well as the multiple-family residential neighborhood to the west.

16. Other existing, small commercial uses in the vicinity do not present the intense conflicts with the neighborhood and surrounding residential development and redevelopment that the AVR ready-mix facility does.

Factor (5): Cost of the property and improvements to the property.

17. AVR purchased the ready-mix facility from Suburban Ready-Mix in 1974 for $260,000.00 and AVR was or should have been aware of its nonconforming use status at the time it purchased the facility. Suburban Ready-Mix had

operated the facility for almost twenty (20) years, and AVR has operated it for the last twenty (20) years. AVR acknowledges that the original investment is fully depreciated.

18. Based upon information reported by AVR, subsequent improvements to the property totaled $123,168.00. AVR's remaining non-depreciated investment in the ready-mix facility is approximately $40,000.00 as of January 1, 1995, while its annual income allocable to this Facility is almost $200,000.00.

Factor (6): Benefit to the public by requiring termination of the nonconforming use.

19. Elimination of AVR's heavy industrial structures. [sic] including the highly visible 60 to 70-foot batching plant tower, would improve the quality of life of nearby residents and business people who view the facility daily from their properties. Elimination of these structures, which do not conform to the City's architectural standards also would improve the general appearance and image of the area. Aesthetics contribute to the quality of life.

20. Numerous complaints have been received over the years regarding traffic, noise and dust generated by AVR. Elimination of the use would eliminate such complaints and would thereby save time and effort by City employees and costs for City taxpayers.

21. Redevelopment activities may accelerate after the termination of AVR's nonconforming use, and may make the property available for different uses consistent with the City's Comprehensive Plan and the zoning ordinance.

22. Elimination of the ready-mix facility and the associated redevelopment of the AVR property could feasibly increase property values in the immediate vicinity of AVR by providing more aesthetic views and decreased traffic, noise, and dust for neighboring single-family and multiple-family residential developments. Increased property values would translate into increased real estate tax generation, providing a benefit for the entire City.

23. Elimination of the substantial heavy truck traffic to and from AVR, which often occurs during peak automobile use times, would improve the quality of life for residents, users of the nearby City park, and customers of the neighboring commercial areas, by eliminating traffic, noise, and dust that are incident to the operation of heavy industrial trucks.

Factor (7): Burden on the property owner by requiring the termination of a nonconforming use.

24. AVR was or reasonably should have been aware of the nonconforming status of the ready-mix facility when it purchased the facility in 1974. Over the ensuing 21 years, AVR has fully depreciated and recaptured its initial investment.

25. AVR will have to terminate its ready-mix operation in St. Louis Park. As a result, AVR will lose the advantages of the monopolistic position that the nonconforming facility has enjoyed throughout AVR's ownership of it.

26. AVR has asserted a number of difficulties it expects to encounter upon termination of its nonconforming use, but

has not provided factual support for its contentions. Many of the difficulties it suggests will occur from the termination would be a direct result of the loss of the favorable market position it enjoys due to its nonconforming status. AVR's suggested "burdens" fail to adequately address the existence and market position of its other facilities in and around the seven-county metropolitan area.

27. The definition of "market area" and the purported results of AVR's relocation search conflict with data presented by City Staff concerning the relevant market area and the availability of possible sites for relocation in metropolitan area cities. Further, AVR has failed to include acquisition of an existing ready-mix facility among its replacement options. AVR has not demonstrated to the satisfaction of the City Council, that it made reasonable efforts to relocate or to identify all relocation options, in spite of its awareness that competitors were taking advantage of relocation and upgrading opportunities during the 1980's. The amortization period also allows AVR an additional two (2) years to relocate and/or adjust its operations.

28. AVR has profited from the nonconforming status of its St. Louis Park facility. AVR has failed to relocate to a conforming site on its own initiative despite having full opportunity to do so for more than twenty (20) years. To the extent that AVR has benefited from the monopolistic advantage it has enjoyed because of its nonconforming status since 1974, rather than relocate its facility, any burden that may be imposed on AVR by the two-year amortization period is in part a self-imposed burden.

29. While the City does not necessarily agree with AVR's apparent view that relocation is impossible and has been impossible for some time, to the extent that the City

were to adopt such a view, it would tend to reinforce that AVR's nonconforming use in St. Louis Park has for some time enjoyed an advantageous market position which has substantially benefited AVR, allowing it to fully recapture its investment in the facility.

30. Based upon a reasonable 15-mile service radius for each of its facilities, continued operation of the St. Louis Park AVR Facility is not critical to the overall AVR ready-mix business, because the market area of the St. Louis Park AVR facility is almost entirely duplicated by four of AVR's other facilities.

31. AVR has not proven that it cannot relocate or that it has made reasonable efforts to do so. Information submitted by AVR indicates that its search considered potential sites that were significantly larger in size than the present site, and that AVR did not consider acquiring an existing ready-mix plant among its relocation options.

32. Even though AVR will have to discontinue its nonconforming use in St. Louis Park at the end of the amortization period, AVR will still own the property on which the ready-mix plant is constructed. At the end of the amortization period, AVR will be free to use the property for use that is permitted under the current zoning designation.

Factor (8): The length of time the use has been in existence.

33. Suburban Ready-Mix established the ready-mix plant on the current site in 1954 and operated it until AVR took over the operation in 1973. AVR purchased the ready-mix plant in February, 1974, and has operated a ready-mix facility

on the property since that time. The ready-mix use thus has been in existence since 1954, i.e. for 41 years.

Factor (9): The length or time the use has been nonconforming.

34. The ready-mix plant became a pre-existing nonconforming use on or about February 5, 1960, the effective date of a new zoning ordinance adopted by the City on December 28, 1959. Under that ordinance, the property on which the ready-mix plant was constructed was included in an I-1 zoning district. Ready-mix plants were permitted in the I-1 district only (1) by special permit and (2) if the plant was not within 400 feet of a residential use. The facility was within 400 feet of a neighboring residential property, so, unable to obtain a special permit, the ready-mix facility became a pre-existing nonconforming use on or about February 5, 1960, and has remained so for the intervening 35 years.

Other factors and considerations

36. To assist it in determining the length of a reasonable amortization period for AVR's St. Louis Park facility, including evaluating the useful life of the facility, the City retained the accounting firm of Arthur Andersen & Company ("Arthur Andersen"), and the appraising firm of Patchin & Associates, Inc. ("Patchin"). The City Council finds that Arthur Andersen [was] qualified to advise it on matters related to accounting and to provide an expert opinion on which the City may reasonably rely. The City Council further finds that Patchin is qualified to advise it on property valuation matters and to provide an expert opinion on which the City may reasonably rely.

37. Arthur Andersen has advised the City that the useful life of AVR's St. Louis Park facility has expired. Specifically, Arthur Andersen found that, under Generally Accepted Accounting Practices ("GAAP"), the facility's useful life expired no later than 1994. Additionally, Arthur Andersen found that, under management cost recovery methods, AVR has fully recovered its investment in the St. Louis Park facility and has earned a return on its investment of approximately 560 percent. Arthur Andersen further opined that the use of GAAP and management cost recovery methods could provide the City with evidence of a reasonable amortization period.

38. Patchin has advised the City that the appraisal submitted by AVR is inadequate for use in the amortization process and has urged the City not to use it as a basis for determining the reasonable amortization period to be applied to the St. Louis Park facility.

39. Based upon the expert opinions of Arthur Andersen and Patchin, the age of the St. Louis Park facility, AVR's proposal to the City nine years ago to replace the existing St. Louis Park structure, AVR's testimony regarding necessary size of potential relocation sites, and the voluntary relocation and/or new construction actions of other ready-mix businesses in the Twin Cities area, AVR's St. Louis Park Facility has passed its useful life and AVR has had a reasonable opportunity to recover its economic investment.

40. Consideration by the City Council of, and any findings made by the City Council related to the generation by AVR of noise and dust or other types of pollution, to the extent the City Council considered or made findings related to such generation, individually and collectively constitute additional justification and grounds upon which the City Council determined the reasonable amortization period

applicable to AVR. Even in the absence of such consideration and findings, the amortization period determined herein to be applicable to AVR is reasonable based upon the other evidence in the record.

41. No single factor considered by the City Council is necessarily determinative of the length or reasonableness of the amortization period to be applied to AVR. Each of the individual factors evaluated by the City Council, however, was considered independent of the other factors and may, in conjunction with any additional factor or factors considered, provide sufficient and rational basis for the determination of the appropriate and reasonable amortization period.

42. The City Council believes that its determination of a reasonable amortization period for AVR, and adoption of that amortization period through amendment of the City's zoning ordinance in accordance with Ordinance Code Section 14:7-4(D)(4), constitutes a legislative decision as the Minnesota Supreme Court has defined and described that concept in its 1981 decision in Honn v. City of Coon Rapids. AVR has contended that the determination and adoption of a reasonable amortization is instead a quasi-judicial decision. Regardless of whether the City Council's determination and adoption of the reasonable amortization period applicable to AVR is a legislative or a quasi-judicial decision, or some hybrid of the two, the findings set forth herein to support the amortization period applied to AVR through an amendment to the City's zoning ordinance is hereby determined by the City Council to be reasonable based on the record before it.

DISCUSSION

I. Summary Judgment Standard

The trial judge is authorized to grant summary judgment under Minn. R. Civ. P. 56.03 "if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits on file, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." Id. While summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed as a substitute for a court or jury trial where there are material factual issues to be determined. Vieths v. Thorp Fin. Co., 305 Minn. 522, 232 N.W.2d 776 (1975). Minnesota courts interpret a material fact as one which will affect the result or outcome of the case, depending upon its resolution. Zappa v. Fahey, 310 Minn. 555, 245 N.W.2d 258 (1976). "[S]ummary judgment is proper when the non-moving party fails to provide the court with specific facts indicating that there is a genuine issue of material fact." Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853, 855 (Minn. 1976); see also Kletschka v. Abbott-Northwestern Hospital, 417 N.W.2d 753, 754 (Minn. Ct. App. 1988). A genuine issue is not technical, sham or frivolous. A & J Builders, Inc. v. Harms, 288 Minn. 124, 179 N.W.2d 98 (1970).

The party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Whether a genuine issue of material fact is presented is determined by asking if "a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the non-moving party has the burden of establishing the existence of every element essential to its case and on which it will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Such evidence and all justifiable inferences that can be drawn from it are to be taken as true. Anderson, 477 U.S. at 255. However, if the non-moving party fails to establish an essential element of its claim, the moving party is entitled to a judgment dismissing that claim as a matter of law. Celotex, 477 U.S. at 322-23.

The parties have stipulated that this case is to be decided based upon this court's review of the record pursuant to Swanson v. City of Bloomington, 421 N.W.2d. 307 (Minn. 1988). "The standard of review is whether the municipal body's decision was unreasonable, arbitrary or capricious, with review focused on the legal sufficiency of and factual basis for the reasons given." Id. at 313.

II. Zoning Decisions are Legislative, Not Quasi-Judicial.

The City presented a rationale for its amortization ordinance.[7] Whether or not AVR has a legitimate quarrel with the wording of the ordinance or the purity of its aims is

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[7] The purpose of the amortization ordinance is set forth as follows:

> St. Louis Park is a fully developed city and as such, there are certain uses which are no longer compatible with the nature of the community. In general, these uses tend to create noise, traffic, and dust problems and have a negative impact on property values and aesthetics due to the fact that they are incompatible with the surrounding area. It is the intent of the City to gradually eliminate those uses which because of their location or manner of operation, create a negative impact on the health and welfare of the neighborhood in which they exist.

insignificant in terms of this court's ability to overturn it. Because zoning is legislative in nature, the standard of review is the reasonableness of the municipal body's action. That principle has not been successfully challenged in any applicable holdings set forth in caselaw.

> Our case law distinguishes between zoning matters which are legislative in nature (rezoning) and those which are quasi-judicial (variances and special use permits). Even so, the standard of review is the same for all zoning matters, namely whether the zoning authority's action was reasonable. Our cases express this standard in various ways: Is there a "reasonable basis" for the decision? or is the decision "unreasonable, arbitrary or capricious"? or is the decision "reasonably debatable"?

Honn v. City of Coon Rapids, 313 N.W.2d. 409, 416-17 (Minn. 1981).

Courts in other Minnesota cases have concluded likewise, and the language with which they have done so is practically uniform. For example, in St. Croix Development, Inc. v. City of Apple Valley, 446 N.W.2d 392 (Minn. Ct. App. 1989), the court, in upholding a zoning ordinance, echoed the oft-repeated mantra of judicial non-interference. It stated:

> The standard of review in all zoning matters is whether the local authority's action was reasonable. Van Landshoot v. City of Mendota Heights, 336 N.W.2d 503, 508 (Minn. 1983). "The court's authority to interfere in the management of municipal affairs should be limited and sparingly invoked." White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176

(Minn. 1982). The mere fact that a court might have reached a different conclusion, had it been a member of the council, does not invalidate the judgment of the city officials if they acted in good faith and within the broad discretion accorded them by statute and ordinance.

St. Croix Development, at 397-98.

In a case that bears significant similarities to the case at bar, State, by Rochester Association of Neighborhoods v. City of Rochester, 268 N.W.2d 885 (Minn. 1978), the court emphasized its traditional minimal role in oversight of zoning decisions:

> As a legislative act, a zoning or rezoning classification must be upheld unless opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare. In other words, the test is a "rational basis" test. A city council has broad discretion in legislative matters, and even if the city council's decision is debatable, so long as there is a rational basis for what it does, the courts do not interfere.

268 N.W.2d at 888; see also Beck v. City of St. Paul, 304 Minn. 438, 448, 231 N.W.2d 919, 925 (1975).

In addition to, and aside from, the above quote (which this court has already stated could have been excerpted from any of perhaps a dozen decisions of this type), State, by Rochester Association of Neighborhoods is significant for a specific reason. In that instance, the court held that the city's action in rezoning a single 1.18-acre tract, (single family and low-density residential to high-density residential) in order to

facilitate construction of a 49-unit condominium project, was properly upheld as a valid exercise of its police power, "unless the opponent proved that it was unsupported by any rational basis related to promoting public health, safety, morals, or general welfare." Id. at 885. In State, by Rochester, as in the case at bar, plaintiff urged the court to draw a distinction between comprehensive zoning ordinances and those which involved a single tract of land, arguing that the latter deserved close judicial scrutiny as an administrative or quasi-judicial act. The court refused. It wrote:

> We decline to follow the rule [subjecting a zoning decision to close judicial scrutiny where only a small parcel was affected] for we have consistently held that "when a municipality adopts or amends a zoning ordinance, it acts in a legislative capacity under its delegated police powers." Beck v. City of St. Paul, 304 Minn. 438, 448, 231 N.W.2d 919, 925 (1975). **This rule applies regardless of the size of the tract of land involved.** See, e.g., Sun Oil Co. v. City of New Hope, 300 Minn. 326, 333, 220 N.W.2d 256, 261 (1974).

State, by Rochester, at 887. (Emphasis added).

In Sun Oil, where the tract of land involved consisted of only one acre, the court wrote, "Even where the reasonableness of a zoning ordinance is debatable, or where there are conflicting opinions as to the desirability of the restrictions it imposes, . . . it is not the function of the courts to interfere with the legislative discretion on such issues." 300 Minn. at 334, 220 N.W.2d at 261.

Contrary to AVR's argument, and consistent with the court's analysis in State, by Rochester, rational review does not require the City to present evidence that implementation

of its overall development plan is imminent.[8] Where courts have had the opportunity to place restrictions on a municipality's legislative powers based upon distinctions such as the progress that the city had already made toward overall implementation, they have not done so.

Even if defendant could have been more charitable in its description of AVR's facility as an "old rust bucket," courts are no more anxious to invalidate an ordinance which reflects a desire to improve the aesthetics of a neighborhood than they are to invalidate an ordinance which is passed to aid in the pursuit of any other aim. In Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn., 492, 499, 162 N.W.2d 206, (1968), the court wrote:

> The mere fact that the adoption of a zoning ordinance reflects a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance. Thus, if the challenged restriction is reasonably related to promoting the general welfare of the community or any other legitimate police power objective, the fact that aesthetic considerations were a significant factor in motivating its adoption cannot justify holding it unconstitutional.

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[8] AVR argued that it should not be forced to curtail its nonconforming use until the City has a development plan:

> The City cannot even argue that the elimination of AVR's concrete plant is part of a current effort to convert the area to residential development. AVR's expert, John Voss, contacted several of the property owners in the area, none of whom had been contacted by the City about relocating or redevelopment. Business owners said that they intend to stay in their location for a very long time. The City could not develop just the AVR parcel as residential, because it is too small to develop individually.

Plaintiff's Memorandum at 16.

Id; see also Oscar P. Gustafson Co. v. City of Minneapolis, 231 Minn., 271, 42 N.W.2d 809 (1950).

In order not to mislead the reader to believe that the judiciary **never** interferes with zoning decisions, this court believes that its analysis would be incomplete without mentioning a case where the court **did** invalidate such an ordinance. In Amoco Oil Co v. City of Minneapolis, 395 N.W.2d 115 (Minn. Ct. App. 1986), the court overturned the city's refusal to issue a conditional use permit. The city had denied plaintiff's request to operate a 24-hour service station. Amoco Oil, however, is distinguishable from the instant case, in that the area at issue was specifically zoned to permit 24-hour stations, as long as no groceries were sold on the premises. In addition, the city had failed to produce any evidence that plaintiff's planned use was more intrusive than uses that were already permitted without a conditional use permit. Here, there is no question that a ready-mix facility is incompatible with the zoning. Therefore, Amoco Oil is inapposite and is wrongly relied upon in support of the proposition that the city's decision with regard to AVR is an example of an arbitrary and capricious misuse of its police power. For the reasons detailed above, this court holds that its review of defendant's amortization ordinance should be limited, and that plaintiff has failed to support its argument that defendant has abused its police powers.

III. Amortization is a Recognized Method to Eliminate Nonconforming Uses.

Plaintiff argues that the City's alleged targeting of AVR as the single use subjected to amortization deprives AVR of property rights. Municipalities throughout the country have been confronted with the same problem: how to eliminate nonconforming uses. The perpetuation of nonconforming

uses has bedeviled many cities that had hoped the uses would just fade away. They do, only rarely. Holdings in cases from this jurisdiction, as well as from others, uphold amortization ordinances as a valid procedure to eliminate nonconforming uses. "Amortization, pursuant to the state's police power, is a device that has been used frequently in recent years to serve as an alternate form of compensation." Klicker v. State, 293 Minn. 149, 197 N.W.2d 434 (1972).

The theory behind amortization ordinances is set forth in Naegele Outdoor Advertising Co. of Minnesota v. Village of Minnetonka, *supra*:

> In recent years a number of municipalities have sought to eliminate preexisting nonconforming uses by means of so-called amortization procedures, of which the Minnetonka provision is a prime example. The theory behind this legislative device is that the useful life of the nonconforming use corresponds roughly to the amortization period, so that the owner is not deprived of his property until the end of its useful life. In addition the monopoly position granted during the amortization period theoretically provides the owner with compensation for the loss of some property interest, since the period specified rarely corresponds precisely to the useful life of any particular structure constituting the nonconforming use.

281 Minn. at 501, 162 N.W.2d at 213.

In Art Neon Co. v. City and County of Denver, 488 F.2d 118 (10th Cir. 1973), where the owner of a sign business argued that a five-year maximum period for the removal of nonconforming signs was arbitrary and capricious, the court noted the difficulties in enacting zoning ordinances, which are inherently prospective in their application. It stated, "[T]here

are usually nonconforming uses which present substantial problems. These uses are necessarily incompatible with the purposes of zoning and are not intended to be perpetual. Thus there usually comes a time when such exceptions are sought to be ended." Id. at 121.

Because owners of nonconforming uses are infrequently accommodating to the desires of the municipalities seeking to eliminate them, it is common for the municipality to prohibit the use from making any improvements. "The public policy behind that doctrine is to increase the likelihood that such uses will in time be eliminated due to obsolescence, exhaustion, or destruction. This in turn will lead to a uniform use of the land consistent with the overall comprehensive zoning plan." Oswalt v. County of Ramsey, 371 N.W.2d 241, 246 (Minn. Ct. App. 1985) (Owner of a home, a use not permitted on a floodplain, was not allowed to make repairs to the home after it had been damaged. An appraiser estimated that the value of the home was approximately $69,000.00; the cost, of repair was in excess of $35,000.00). Finding No. 6 states:

> AVR proposed in 1986 to completely replace the existing two structures with what it characterized as a "state of the art" ready-mix plant. The city denied AVR's request as a violation of its City Code, because the City Code prohibited the expansion or intensification of a nonconforming use.

This court finds that the City's refusal to allow AVR to replace the structure is consistent with caselaw in Minnesota and with zoning policy.

A significant number of the court decisions which have upheld the use of amortization ordinances to eliminate nonconforming uses have factored into their analysis the owner's enjoyment of monopoly status during the period of

time that the use has been nonconforming. In Outdoor Graphics, Inc. v. City of Burlington, Iowa, 103 F.3d 690 (8th Cir. 1996), the court upheld the use of an amortization procedure against criticism that the process amounted to the denial of an owner's property rights.[9] The court disagreed, in part because of the monopoly factor:

> An amortization period allows a nonconforming owner to recoup investment and also sometimes affords the owner the additional benefit of monopoly status during the period since no new competitive nonconforming uses are allowed. 8A Eugene McQuillan, Municipal Corporations, § 25.190 (3d ed. 1994). It is in reality a notice to owners that they have a period of time to make whatever adjustments or other arrangements they can to accommodate the regulations.

Outdoor Graphics, 103 F.3d at 693, fn. 5.

In City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972), the court cited both public policy and appellant's monopoly status in its holding that an amortization ordinance was properly applied to eliminate the nonconforming use of two lots. It stated, "There are strong public policy arguments and a demonstrable public need for the fair and reasonable

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[9] The facts of Outdoor Graphics echo those of many cases challenging the validity of amortization ordinances. The owner of billboards brought an action for damages and injunctive relief against the city for allegedly depriving it of property without just compensation. The city had adopted an ordinance that prohibited billboards in residential areas. There was no dispute that the ordinance was duly passed and that Outdoor and other Burlington residents were offered notice and an opportunity to be heard. The city's stated reasons for enacting the ordinance were safety and aesthetics. The ordinance provided a five-year "grace period."

termination of nonconforming property uses which most often do not disappear but tend to thrive in monopolistic positions in the community." Id. at 778. This phenomenon was noted as well in Grant v. Mayor and City Council of Baltimore, 129 A.2d 363 (Md. Ct. App. 1957), where the council granted owners of nonconforming billboards located in residential areas five years within which to remove them:

> Nonconforming uses have not disappeared as we had hoped and anticipated because the general regulation of future uses and changes, with some existing uses uncontrolled, have put the latter in an entrenched position often with a value that is great - and grows - because of the artificial monopoly given it by the law. Indeed there is general agreement that the fundamental problem facing zoning is the inability to eliminate the nonconforming use.

Id. at 365, *quoting* City of Los Angeles v. Gage, 127 Cal. App.2d 442, 274 P.2d 34, 40 (1954).

This court notes that AVR has benefited from such monopoly status. It has operated, without the burden of competition, since it bought the ready-mix facility in 1974.

In addition, the court in Outdoor Graphics noted that the owner bought the property with knowledge of its nonconforming status.[10] In the case at bar, AVR bought the

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[10] The court wrote:

> Outdoor bought the business with the knowledge that the billboards were nonconforming uses and that the parcels of land were irregularly shaped and were not of much commercial value absent the billboards. Outdoor has enjoyed the benefit of monopoly status during the pendency of this action. It knowingly purchased property that had been subject to a nonconforming use during a prolonged period - at least thirty-seven years with a predicted life of fifteen more years.

facility ***after*** it had been declared a nonconforming use. This is reflected in the City's Findings of Fact. Finding of Fact No. 12 states:

> The facility became a nonconforming use on or about February 5, 1960, the effective date of a new zoning ordinance under which ready-mix and concrete block plants were permitted in the I-1 Industrial Use Zoning District that included AVR only (1) By special permit and (2) only if the plant was located more than 400 feet from any residential use. The facility was located within 400 feet of a residential use to the east and thus, AVR did not meet the criteria for a special use permit.

AVR bought the ready-mix facility in 1974, approximately 14 years after it became nonconforming. The fact that the city's decision to eliminate the ready-mix plant cannot possibly come as a surprise to plaintiff was considered by this court, and is further reflected in its conclusion that amortization is an acceptable means in this cast to eliminate AVR as a nonconforming use.

IV. The Holding in Naegele Supports the City's Amortization Ordinance.

Plaintiff argues that Naegele, a case cited by both parties, does not support defendant's amortization ordinance. This court disagrees. In Naegele, the Minnesota Supreme Court upheld an ordinance which required removal of nonconforming billboards from areas zoned residential within a three-year period, The standard of proof which is assumed

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103 F.3d 690 at 694.

by plaintiffs seeking to prove that an amortization ordinance is unconstitutional[11] was delineated in Naegele as follows:

> The underlying issue in making this determination must therefore be whether the amortization provided by the statute is reasonable. If the value of plaintiff's property interest was extinguished before the running of the 3-year period, there would be no taking, or if the value of freedom from new competition for the statutory period equaled the value of the property interest remaining at the end of the period, there would be just compensation for the taking. In either case, the length of the amortization period is reasonable and the ordinance therefore is constitutional. The question then becomes one of the constitutional application of the ordinance in a given case, and the burden is on plaintiff to establish that the ordinance, as applied, is unconstitutional.

281 Minn. at 501, 162 N.W.2d at 213.

The court recognized that the case raised two issues: (1) whether a municipality has the power to prohibit by zoning ordinance the use of land in residential districts for billboard advertising, and (2) if so, whether the removal of previously constructed billboards can be required within a period of 3 years from the date they became nonconforming uses.

The court answered both questions in the affirmative. Plaintiff distinguishes Naegele using criteria that are not persuasive. For example, AVR argues that the amortization ordinance in Naegele is unlike that of the case at bar because

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[11] As a preliminary matter, the court stated that plaintiff could not successfully challenge the amortization ordinance as unconstitutional unless it would be unconstitutional as applied to the property interests of every billboard owner.

of the nature of the property that is a nonconforming use. It states, "A permanent ready-mix concrete plant is far removed from a billboard which the Supreme Court found to be removable personal property." Plaintiff's Brief at 15. While there is some truth to that distinction, this court was unable to find a case, from any jurisdiction, which utilized that factor in determining the reasonableness of a particular ordinance. AVR also believes that the fact that the area surrounding its facility is not exclusively residential, at this point in time, deprives the ordinance of its claim of evenhandedness. As discussed in the section entitled "AVR Has Not Been Deprived of Equal Protection of the Laws," defendant's ability to enact a zoning ordinance is limited only in that it cannot do so arbitrarily and capriciously.

V. "Useful Life" Refers to Recoupment of Investment.

Of all of plaintiff's arguments, AVR reserves its most strident criticism for defendant's interpretation of the term "useful life" and its application to the AVR facility. Both parties recognized that this court's pivotal determination will be which of their calculations of the facility's useful life is correct, and each has presented evidence in support of its view.

AVR submitted the following "market value asset valuation" of its facility prepared by Valuation Specialists, whose report contained the following statements:

> 1. Physical depreciation is defines [sic] as "decline in value due to such causes as wear and tear, decay, deterioration arising from age and loss not restored by current maintenance.

2. "The primary factors affecting the value of the equipment are age, condition and type of equipment. Most of the equipment was found to be in fair condition."

3. "The value shown in the financial records for fixed assets would be the depreciated original cost. This may not be a fair approximation of the market value or liquidation value of the fixed assets."

4. "Depreciation for market value purposes may be defined as a loss from an upper limit of value. To further elaborate, it is the effect caused by deterioration and/or obsolescence. Deterioration or physical depreciation is a physical wearing out of the asset."

5. "Effective age may be defined as the number of years of age as defined by the physical condition and obsolescence. If maintenance has been good, the effective age could be less than actual age."

6. ***The report concludes that the market value of the fixed assets of AVR's St Louis Park facility as of August 29, 1995, was $366,750.***

Pl. Brief at 18-19. (Emphasis added).

AVR emphasizes that the calculation of useful life adopted by Valuation Specialists is consistent with that the view of AVR's appraiser, Shenahon & Company, which found:

1. "With proper maintenance of the shell facility and the plant equipment as needed, the life and usefulness of the facility can be extended significantly beyond the anticipated remaining life; and to a greater extent than many other commercial properties. This is because the basic function and design of concrete production facilities has changed very little over time as compared, for example, to hotel, retail, or office properties."

2. After itemizing the equipment upgrades in 1989-90, the appraisal states: "These improvements significantly increase the life of the plant."

3. "The effective life of cement mixing equipment according to the Marshall Swift Valuation Services is twenty years, and we find that the subject equipment overall has an effective life of five years, with an effective remaining life of fifteen years if nothing is done to extend the life of the improvements."

4. "We estimate that depreciation from all causes is allocated on the following basis: Physical depreciation, 53%; Functional Obsolesce, 5%; Economic Obsolescence, 0%.

5. "With proper maintenance the structure could maintain its integrity for another forty years and the plant could easily be operated as long as the equipment is replaced and maintained as it has in the past."

6. "When calculating the physical depreciation on a plant such as the subject which has been operating for a significant period of time the actual age of the facility ceases to be as significant as the physical condition of the property at the time of the appraisal and the number of years that is maintained and repaired properly over time[."]

Pl. Brief at 19-20.

The court is not persuaded by AVR's representation of what is meant by the term "useful life" in the context of evaluating the reasonableness of an amortization ordinance. Even plaintiff's recitation of the testimony of Mr. Joe Senecal, which is set out in the Record at Tab 38, pages 12-14 of the Minutes of the November 23, 1992, Special City Council Meeting, misses the mark in terms of characterizing the method by which concrete plants are to be valued for purposes of amortization.[12] AVR is probably correct in its assertion that Mr. Senecal had in mind an observation more

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[12] Mr. Senecal introduced himself as an expert appraiser of ready-mix concrete plants. He testified:

> So, plants, if they are well maintained and they got taken good care of, they can last for a long time. We're havin' a problem with concrete plants around the country. This is not the only place. For some reason, everybody got to have concrete but yet we got a problem with concrete plants, and it's the zoning that makes the problem with the concrete plants and because of the zoning, it now makes the concrete plants very, very valuable. So anybody that has a concrete plant that's up and operating, it's worth a lot of money. To move a plant today similar to the St. Louis Park one, and relocate it, you'd be talkin' about anywhere from 1.5 million to 1.8 million easy.

Plaintiff's Memorandum at 25-26.

insightful than, "Concrete plants [are] getting to be a problem around the country." However, this court also disagrees with AVR's interpretation of the portion of Mr. Senecal's testimony which seems to attribute more value to ready-mix plants than mere recoupment of investment in the structure would support *because* of generally inhospitable zoning regulations. AVR urges that the court agree with it that, "The true nature of Senecal's testimony is that zoning changes cause ready-mix plants to become much more valuable because cities are limiting (or in this case, prohibiting) the location of ready-mix plants." Plaintiff's Memorandum at 26. This court finds that neither spin is correct; however, it also finds that the City did not rely on Mr. Senecal's testimony.

This court adopts the City's calculation of AVR's useful life, because it is consistent with other holdings on the issue. In City of University Park v. Benners, 485 S.W.2d 773 (Tex. 1972), the court enumerated factors to be considered in determining whether an amortization ordinance is reasonable:

> In the application of the reasonableness test to the legislative determination, the courts have used a variety of factors, and combinations thereof. These include the nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area.

Id. at 122.

As noted by defendant, AVR has a network of ready-mix plants in the western half of the metropolitan area as well as a gravel mining operation in Apple Valley. The taxable income

from this facility which represents approximately ten percent of AVR's income from its concrete operations was $113,000.00 in 1992, $172,000.00 in 1993 and $200,000.00 in 1994. The facility had been a nonconforming use for fourteen years in 1974, when AVR bought it for $260,000.00 The facility has provided a substantial return over the last 23 years. It is fully depreciated from an income tax standpoint, and under Generally Accepted Accounting Principles. See Def. Brief at 25.

Plaintiff took particular offense at defendant's mention of the depreciation status of the facility on tax forms, stating that "tax depreciation is a fiction that does not recognize the reality that AVR's St. Louis Park facility has significant useful life left." Pl. Brief at 20. In Grant v. Mayor and City Council of Baltimore, 129 A.2d 363 (Md. Ct. App. 1957), the owner of billboards argued that a five-year amortization period was inadequate for the purpose of valuing his property, despite the fact that his accountant testified that, at the direction of company officers, he used a five-year depreciation schedule for tax purposes. The court was unimpressed:

> A corporation that has regularly, year by year, acted in its financial affairs, under the oath of its authorized officers (and penalty of perjury) on the premise that the full useful life of its billboards is five years is handicapped seriously in arguing persuasively that legislative reliance on that same premise has done it a constitutional wrong - has taken from it substantial property without compensation - by banning further use of those billboards.

Id. at 372.

AVR is similarly handicapped in its argument against the relevance of a calculation upon which it has relied itself.

Cases offer strong refutation to AVR's assertion that the applicable measure of useful life is market value. "The owner must "be afforded an opportunity to recover his investment in the structures theretofore placed on the property. The reasonableness of the opportunity for recoupment thus afforded is measured by conditions at the time the use is declared nonconforming and not . . . by conditions upon expiration of the tolerance period." City of University Park, at 779.

Similarly, there is no support for an argument that AVR should be allowed to operate until the owner can recover the market value of the structure:

> [W]e conclude that Benners necessarily precludes recoupment or recovery of the market value or any conformity cost of the structures as essential considerations in determining the question of reasonableness by requiring only that the owner be afforded a reasonable opportunity to recoup or recover his investment in the structure.

Lubbock Poster Co. v. City of Lubbock, 569 S.W.2d 935, 942 (Tex. Ct. App. 1978), *cert, denied,* 444 U.S. 833 (1979).

The leading case on measuring recoupment of investment is Murmur Corp. v. Board of Adjustment of the City of Dallas, 718 S.W.2d 790 (Tex. Ct. App. 1986), where the owner of a nonconforming smelter appealed its order to terminate. The court sided with the municipality:

> Murmur attacks the board's order on the ground that it failed to follow the proper standard for terminating the alleged nonconforming use. It argues that the board is authorized to terminate a nonconforming use only after allowing the use to continue for a sufficient time to recover the "full value" of the

> nonconforming structure, which it interprets to mean market value or replacement value, and therefore, that the board could not properly limit the allowance to Murmur's actual investment in the nonconforming use. . . . . [W]e conclude that recoupment of the investment is a permissible standard.

Id. at 795.

The court wrote further, "If the owner is entitled to recoup only his 'investment in the structure,' then that amount is the measure of 'full value' rather than the market value or any other measure of value." Id.

As this court noted previously, AVR purchased the facility in 1974, for $260,000.00. It has recouped its investment in the structure. For the reasons outlined above, the court agrees with the City's position as to AVR's useful life, and thus finds that the City's amortization ordinance was properly applied to AVR and does not deprive it of property without compensation.

VI. The City Did Not Rely Solely Upon Anecdotal Evidence.

AVR argues that the City placed undue emphasis on the opinions of neighbors, particularly those who reside in the condominium complex, 3300 on the Park. To bolster its contention that this court is obligated to invalidate the amortization ordinance because of the City's allegedly unreasonable reliance on anecdotal evidence, it cited a Minnesota case, which this court believes is inapposite.

In Scott County Lumber v. City of Shakopee, 417 N.W.2d 721 (Minn. Ct. App. 1988), the court held that the City's denial of a conditional use permit to operate a gravel pit was arbitrary, as it was not supported by legally sufficient reasons. In Scott County, however, the City relied solely

upon neighborhood opposition in its denial, in spite of the fact that both the environmental assessment worksheet recommendation and the sound test results clearly supported issuance of the permit. The most notable aspect of the case, however, was the extent to which the City was determined to bend the rules in order to accommodate the wishes of neighboring landowners. For example, a city council member who voted to deny the permit, "admitted glancing at the environmental assessment worksheet, said that it did not influence his vote and that he based his decision on landowners' testimony." Id. at 725. Scott County does not stand for the sweeping proposition that a legislative body may not consider testimony from neighbors, only that it may not do so in order to supplant other evidence, "[The] City relied solely on complaints from nearby residents which does not provide a legal and sufficient basis under Minnesota law." Id. at 728. This interpretation finds support in other Minnesota cases as well. "Community opposition to a landowner's desire to use his property for a particular purpose is not a legally sufficient reason for denying a conditional use permit." C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320, 325 (Minn. 1981); Amoco Oil Co. v. City of Minneapolis, 395 N.W.2d 115, 118 (Minn. Ct. App. 1986).

The holdings of none of the above-cited cases espouses the theory that neighborhood support of, or opposition to, a particular ordinance has no place in determining whether or not it is passed, only that a municipality also must heed the opinions of experts with the opposing position. That balance is what is required was reaffirmed in the recent case Trisko v. City of Waite Park, 566 N.W.2d 349 (Minn. Ct. App. 1997). Appellant owned a 98-acre rock quarry. The City rejected application for a conditional use permit to operate another quarry. Appellant contended that the city had improperly discounted the testimony of experts in favor of neighborhood

opposition consisting of vague and speculative opinions.[13] The Trisko court held that a municipality must base the denial of a conditional use permit on "something more concrete than neighborhood opposition and expression of concern for public safety." Id. at 355; see also Chanhassen Estates Residents Ass'n v. City of Chanhassen, 342 N.W.2d 335 (Minn. 1984).

Because this court finds that St. Louis Park did not unreasonably credit neighborhood opposition over expert testimony in favor of the continued operation of AVR, this court believes that AVR's objection to the amortization ordinance on that basis is without merit.

VII. AVR Has Not Been Deprived of Equal Protection of the Laws.

Courts "frequently [have] upheld underinclusive classifications on the sound theory that a legislature may deal with part of a problem without addressing all of it." Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 470 (8th Cir. 1991), *quoting* Erznoznik v. City of Jacksonville, 422 U.S. 205, 215, 95 S.Ct. 2268, 2275-76 (1975). AVR names other establishments which are not being amortized by the City, such as Al's Liquor and Park Auto, and asserts that the record reflects no rational basis that supports the distinction.

AVR argues that it has been subjected to disparate treatment in violation of the Equal Protection Clause of the Fourteenth Amendment, which states that no State shall "deny

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[13] Although at least one neighbor stated that many older residents in the past had contracted silicosis, a respiratory disease, from granite dust produced by the existing quarry, and several neighbors asserted that they expected an increase in dust-related respiratory problems if the proposed quarry opened, it was established by expert testimony that the exposure level for silicosis dust surrounding the quarries is "one-quarter of the level that is considered safe," which would create essentially no risk. Id. at 356.

to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) *citing* Plyler v. Doe, 457 U.S. 202, 216 (1982). In support of its assertion that the City has held it to a standard that it has not applied uniformly to other similar establishments, AVR cites two cases, both of which are inapposite.

In Cleburne, the Cleburne Living Center intended to lease a building for the operation of a group home for the mentally retarded. Using archaic nomenclature, the City determined that as a "hospital for the feeble-minded," the home required a special use permit, which it then summarily denied.[14] The question presented was whether the city could require a permit for the facility to house the mentally retarded when it did not for other care and multiple dwelling facilities. The three underlying justifications for the distinction were arbitrary and disingenuous. The council noted that a majority of landowners living within 200 feet of the residence were opposed to living near a home for the mentally retarded, that the home's location near a junior high would inevitably lead to harassment by the students and that the home's location on a 500-year flood plain was unsafe. With regard to the sentiments of the landowners, the Supreme Court held (and, as this court noted in the previous section), mere unsupported negative attitudes are an insufficient basis upon which to deny a special use permit. Id. at 448. With regard to the home's location on a flood plain, the City presented no evidence that the nature of the residents' disabilities had any impact on the level of danger posed by a flood. Id. at 449.

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[14] In holding the ordinance constitutional, the district court nevertheless noted that if the potential residents of the group home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance.

The Court held that because the record was devoid of any rational basis for believing that the proposed group home would threaten the city's legitimate interests in a way that permitted uses would not, requiring a special use permit for the home deprived the operators of equal protection of the laws.

In Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991), the issue was whether the city's attempt to prevent a church from locating in the central commercial and industrial zone violated the church's constitutional rights. The City Council's resolution provided:

> The nature and timing of general church activities is in contrast to the business environment and to the business hours of the downtown. Therefore, no business or retail contribution or activity is generated which is contrary to the intent of the C-3 zone and the goals and objectives of the Downtown Redevelopment Plan and the Hastings Comprehensive Plan.

Id. at 467.

The City, however, did permit other non-commercial entities to be situated in the C-3 zone. For example, within the C-3 zone the City allowed fraternal organizations, which would similarly generate a lack of revenue. The court struck down the ordinance on equal protection grounds:

> The Church has placed the City's rationale for excluding churches at issue. The City is excluding the Church because it will not generate economic activity, but the Church has established a relevant similarity between itself and permitted non-commercial entities. It is now incumbent on the City to provide the rational basis for this apparent unequal

> treatment of similarly entities. The City has failed to support its exclusion of the Church with any justification beyond the affidavits of the city planners.

Id. at 471.

Contrary to plaintiff's representations, defendant has not treated similarly situated entities differently. Defendant has amply demonstrated that the noise and dust generated by AVR is significantly more severe and disruptive than noise and dust caused by other commercial entities that are, at this point, not targeted by the amortization ordinance.[15] Because defendant has stated a nondiscriminatory justification for its treatment of AVR, it survives a challenge based on equal protection concerns. For that reason, this court dismisses AVR's objection to the amortization ordinance on that basis.

CONCLUSION

For the reasons outlined above, this court grants defendant's motion for summary judgment. The court denies plaintiff's motion for summary judgment and dismisses plaintiff's Complaint.

H.P.A.

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[15] For example, in its brief, AVR objected to the fact that Al's Bar and the automobile reduction plant were exempted from the amortization ordinance. However, it concedes that Al's Bar received support from neighborhood residents, and the automobile reduction plant went out of business. See Plaintiff's Brief at 5-6.

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

AVR, Inc.,
a Minnesota corporation,

Plaintiff,

v.

City of St. Louis Park,

Defendant.

NOTICE OF APPEAL TO COURT OF APPEALS

TRIAL COURT CASE NO. AP-96-0182

Date Judgment Entered: February 20, 1998

TO: Clerk of Appellate Courts, Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, MN 55155.

PLEASE TAKE NOTICE that the above-named Plaintiff appeals to the Court of Appeals of the State of Minnesota from a judgment of the Court entered on the date shown, entering judgment in favor of Defendant.

Attorney for Defendant: Thomas M. Scott, Campbell, Knutson, Scott & Fuchs, P.A., Suite 317 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, MN 55121, (612) 452-5000.

Dated: March 20, 1998.

By: /s/
Wm. Christopher Penwell (#164847)
Anthony J. Gleekel (#185395)

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STATE OF MINNESOTA
IN COURT OF APPEALS

AVR, Inc.,
a Minnesota corporation,

Appellant,

v.

City of St. Louis Park,

Respondent.

APPELLANT'S STATEMENT OF THE CASE

Trial Court Case No.:
AP-96-0182

Appellate Court Case No.:

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1. **Court or agency of case origination and name of judge or hearing officer who presided.**

   State of Minnesota, Hennepin County District Court, Fourth Judicial District, H. Peter Albrecht, Judge of District Court.

2. **Jurisdictional Statement.**

   Appellant appeals the Court's entry of judgment in favor of Respondent. Judgment was entered February 20, 1998.

3. **State the type of litigation and designate any statutes at issue.**

   Zoning/Constitutional Law.

4. Brief description of claims, defenses, issues litigated and result below.

Between 1992 and 1995, the City of St. Louis Park adopted several ordinances which singled Appellant out as the only use in the City to be amortized out of existence. An extensive record was developed in numerous City Council hearings in which Appellant and Respondent submitted testimony and other evidence. On October 2, 1995, the City passed an ordinance establishing a two year amortization period at the end of which Appellant was to terminate its ready mix concrete operation. In the District Court, Appellant and Respondent agreed to submit cross-motions for summary judgment based upon the record developed before the City Council. Appellant claims that the amortization ordinance violates its constitutionally held property rights, violates Appellant's substantive due process rights, violates Appellant's equal protection rights, improperly applies Minnesota case law on amortization of existing uses, and is contrary to established caselaw relating specifically to Appellant's facility. Appellant also asserted that Respondent, in passing the amortization ordinances, acted in a quasi judicial, not legislative, capacity and that, therefore, the District Court could exercise greater discretion in reviewing Respondent's actions. The District Court ordered summary judgment in favor of Respondent finding that Respondent had acted in a legislative capacity, recognizing amortization as a proper method of eliminating non-conforming uses, finding that Respondent's adoption of the amortization ordinances was reasonable and rejecting Appellant's claims that Respondent had violated its constitutional rights.

5. Issues proposed to be raised on appeal.

a. Did the District Court err in granting Respondent's motion for summary judgment and denying Appellant's motion for summary judgment?

b. Does the Minnesota Court of Appeals' decision in Apple Valley Red-E-Mix v. City of St. Louis Park, 359 N.W.2d 313 (Minn. Ct. App. 1984) control the determination of this case?

c. Did Respondent act in a quasi judicial, not legislative, capacity in passing, the amortization ordinances?

d. Did Respondent, in passing the amortization ordinances, violate Appellant's federal and state constitutionally protected 5th and 14th Amendment property rights?

e. Did Respondent, in passing the amortization ordinances, act arbitrarily, capriciously and unreasonably in violation of Appellant's federal and state substantive due process rights?

f. Did Respondent, in passing the amortization ordinances, violate Appellant's federal and state constitutionally protected right to equal protection?

g. May Respondent amortize Appellant's non-conforming use out of existence and, if so, was the two year amortization period legally and factually supported by the record and case law?

6. **Is a transcript required?**

   Yes, a full transcript is required.

7. **Is oral argument requested?**

   Yes.

8. **Are formal briefs necessary?**

   Yes.

9. **Argument location provided?**

   No.

10. **Name, address, zip codes and telephone numbers of the attorneys for Appellant and Respondent.**

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Dated: March 20, 1998.

By: /s/

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STATE OF MINNESOTA
IN COURT OF APPEALS
C7-98-516

AVR, Inc.,
Appellant,

vs.

City of St. Louis Park,
Respondent.

Filed October 20, 1998
Affirmed
Willis, Judge

Hennepin County District Court
File No. 96182

Gerald S. Duffy, William Christopher Penwell, Anthony J. Gleekel, Siegel, Brill, Greupner, Duffy & Foster, P.A., 100 Washington Avenue South, Suite 1300, Minneapolis, MN 55101 (for appellant)

Roger N. Knutson, Thomas M. Scott, Campbell Knutson, P.A., 1380 Corporate Center Curve, Suite 317, Eagan, MN 55121 (for respondent)

Considered and decided by Kalitowski, Presiding Judge, Amundson, Judge, and Willis, Judge.

SYLLABUS

1. A city's adoption of an ordinance establishing an amortization period for a preexisting nonconforming use is a legislative act that courts afford great deference.

2. A two-year amortization period is reasonable where it reflects a property's useful life and a city's analysis of other relevant factors.

3. Where there is no showing of disparate treatment of similarly situated property owners, an amortization ordinance and an ordinance establishing an amortization period for a property does not violate the Equal Protection Clause.

OPINION

WILLIS, Judge

Appellant AVR, Inc., challenges the district court's order granting summary judgment to respondent City of St. Louis Park, claiming that the city's zoning ordinance that establishes a two-year amortization period for appellant's preexisting nonconforming use is unreasonable and violates appellant's right to equal protection of the laws. We affirm.

FACTS

AVR owns and operates a ready-mix concrete plant in the City of St. Louis Park. The plant was constructed in 1954. In 1959, the city passed a zoning ordinance permitting ready-mix plants in the area of the city zoned for industrial use but only pursuant to a special use permit. The city did not grant at a special use permit to the then-owners of this ready-mix plant,

but rather classified the plant as a preexisting nonconforming use, because it was within 400 feet of a residential district.

In 1973, the city amended its zoning code to eliminate ready-mix and concrete block plants as permitted uses in the city. AVR purchased the ready-mix plant in 1974 for $260,000. In May 1980, the city adopted a new comprehensive plan and put AVR on notice that the city intended to phase out the plant and rezone the site for commercial or office use or "as a second choice high density residential use." AVR commenced a declaratory judgment action seeking to invalidate the 1973 zoning ordinance on the ground that it wrongfully eliminated ready-mix plants as permitted uses in industrial zones. The district court declared the ordinance void as applied to AVR, and the city appealed. This court concluded that because the plant was not a public nuisance or a nuisance per se, the city could not legislate it out of existence. ***Apple Valley Red-E-Mix v. City of St. Louis Park***, 359 N.W.2d 313, 315 (Minn. App. 1984), ***review denied*** (Minn. Mar. 21, 1985).

In 1990, the city adopted another new comprehensive plan, which provides that, in the area where the AVR plant is located,

> [h]eavy industrial uses including a concrete ready-mix plant and outdoor storage of heavy equipment are to be phased out, and the sites are to be used for high density residential use.

St. Louis Park, Minn., Comprehensive Plan 1990-2010 § 16, at 16-5 (1990). In 1992, the city rezoned AVR's property from I-4 Industrial to R-4 Multifamily Residential. The ordinance provides that the city council

> shall by ordinance amend the Zoning Ordinance to establish an amortization period for individual land

uses not permitted in the City. The amortization period shall commence upon publication of the ordinance establishing the length of amortization period.

St. Louis Park, Minn., Code of Ordinances § 14:7-4(D)(4) (1992). The 1992 ordinance required the owners of all properties "that contain a use not permitted in any zoning district [to] register their non-conforming use with the City" within one year of the adoption of the ordinance. ***Id.*** § 14:7-4(B). The ordinance also required the zoning administrator to meet with such property owners, review each registration application, and determine a reasonable amortization period for each nonconforming use. In determining the length of a reasonable amortization period, the zoning administrator was to consider, at a minimum, the following factors:

a. Information relating to the structure located on the property;
b. Nature of the use;
c. Location of the property in relation to surrounding uses;
d. Description of the character of and uses in the surrounding neighborhood;
e. Cost of the property and improvements to the property;
f. Benefit to the public by requiring the termination of the non-conforming use;
g. Burden on the property owner by requiring the termination of the non-conforming use;
h. The length of time the use has been in existence and the length of time the use has been non-conforming.

Id. § 14:7-4(D)(2). The city council accepted AVR's registration of the plant property as substantially complete on June 29, 1995.

On July 11, 1995, the city council and planning commission held a joint public hearing for the purpose of adopting an amortization ordinance relating to the AVR plant. City staff presented to the council and planning commission the report and recommendation required by the 1992 ordinance. AVR presented information supporting its position that the plant has an indefinite remaining physical life.

On October 2, 1995, the city amended its zoning ordinance by adopting the following provision:

> The reasonable amortization period applicable to the ready-mix facility owned and operated by [AVR] * * * shall be two (2) years, commencing upon publication of this ordinance. At the conclusion of the two-year amortization period, [AVR's] nonconforming ready-mix use shall terminate and cease to operate.

Id. § 14:7-4.1 (1995). In conjunction with the adoption of section 14:7-4.1, the city council adopted a resolution that contained 42 findings of fact supporting the ordinance and that stated:

> The Minnesota Supreme Court has directed, in the ***Naegele Outdoor Advertising Co. of Minn. v. Village of Minnetonka*** decision, that any amortization period must be "reasonable." Courts in other jurisdictions have identified at least seven (7) factors by which the reasonableness of an amortization period may be evaluated. The St. Louis

> Park Code of Ordinances incorporates those specific factors in its Amortization Ordinance.

St. Louis Park, Minn., Res. No. 95-131, ¶ 3 (1995) (citing St. Louis Park, Minn., Code of Ordinances § 14:7-4(D)(2)(a-h) (1992)). The city addressed the factors identified in its amortization ordinance in making findings to support its determination of the length of the amortization period for AVR's plant.

The city also considered the useful life of the plant. To assist it in making that determination, the city retained an accounting firm and a real estate appraisal firm. The accounting firm advised the city that, based on generally accepted accounting principles, the plant's "useful life expired no later than 1994" and that AVR had not only recovered its investment but also had earned a return of approximately 560 percent on its investment. ***Id.*** ¶ 37. The city council found that

> [b]ased upon the expert opinions of Arthur Andersen and Patchin, the age of [AVR's] St. Louis Park Facility, AVR's proposal to the City nine years ago to repiace the existing St. Louis Park structure, AVR's testimony regarding necessary size of potential relocation sites, and the voluntary relocation and/or new construction actions of other ready-mix businesses in the Twin Cities area, AVR's St. Louis Park Facility has passed its useful life and AVR has had a reasonable opportunity to recover its economic investment.

Id. ¶ 39.

In December 1995, AVR commenced an action seeking a declaration that the city's adoption of the amortization

ordinance and the ordinance establishing a two-year amortization period for AVR's plant (1) violate AVR's right to due process of law; (2) violate AVR's right to equal protection of the laws; (3) violate AVR's vested rights by eliminating concrete ready-mix plants as a special or permitted use; and (4) constitute an unconstitutional taking of AVR's property without just compensation. AVR and the city made cross-motions for summary judgment. On January 15, 1998, the district court granted summary judgment to the city and dismissed AVR's complaint. This appeal followed.

ISSUES

1. Did the district court err in deferring to the city's broad discretion to adopt an ordinance establishing a two-year amortization period for AVR's plant?

2. Did the district court err in upholding the city's ordinance establishing a two-year amortization period for AVR's plant?

3. Did the district court err in concluding that the city's adoption of an amortization ordinance and an ordinance establishing a two-year amortization period for AVR's plant does not violate AVR's right to equal protection of the laws?

ANALYSIS

On appeal from summary judgment, a reviewing court determines whether any genuine issues of material fact exist and whether the district court erred in applying the law. ***Wartnick v. Moss & Barnett***, 490 N.W.2d 108, 112 (Minn. 1992). In making its determinations, "the court must view the evidence in the light most favorable to the nonmoving party," ***State by Beaulieu v. City of Mounds View***, 518 N.W.2d 567, 571 (Minn. 1994).

I.

AVR contends that the city's adoption of an amortization ordinance for AVR's plant is equivalent to a decision to grant or deny a variance or special use permit. Therefore, AVR argues, the city's decision is quasi-judicial and the courts should afford it less deference than they would give a legislative zoning decision. Minnesota courts have distinguished

> between zoning matters which are legislative in nature (rezoning) and those which are quasi-judicial (variances and special use permits). Even so, the standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable. Our cases express this standard in various ways: Is there a "reasonable basis" for the decision? or is the decision "unreasonable, arbitrary or capricious"? or is the decision "reasonably debatable"?

Honn v. City of Coon Rapids, 313 N. W.2d 409, 416-17 (Minn. 1981). But application of the reasonableness standard depends on the zoning action at issue:

> [I]n legislative zoning, the municipal body is formulating public policy, so the inquiry focuses on whether the proposed use promotes the public welfare. In quasi-judicial zoning, public policy has already been established and the inquiry focuses on whether the proposed use is contrary to the general welfare as already established in the zoning ordinance. Consequently, the reviewing courts, in determining what is reasonable, should keep in mind that the zoning authority is less circumscribed by

> judicial oversight when it considers zoning or rezoning than when it considers a special use permit or a variance.

Id. at 417. AVR argues that because the amortization on ordinance "does not effect a zoning change to unimproved property" but rather "terminat[es] AVR's use of the property" as a ready-mix plant, it is "equivalent to the grant or denial of a special use permit. We disagree. ***See Naegele Outdoor Adver. Co. v. Village of Minnetonka***, 281 Minn. 492, 501, 503, 162 N.W.2d 206, 213, 215 (1968) (identifying ordinance establishing amortization period as legislative device and stating power to enact "this type of zoning requirement" is implied); ***DI MA Corp. v. City of St. Cloud***, 562 N.W.2d 312, 319-20 (Minn. App. 1997) (analyzing validity of amortization ordinance under statute that establishes requirements for amendments to zoning ordinances).

Because zoning or rezoning classifications are legislative acts, courts must uphold them unless

> [their] opponents prove that the classification is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare, or that the classification amounts to a taking without compensation. This rule applies regardless of the size of the tract of land involved.

State by Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 888 (Minn. 1978).

AVR has not shown that the city's adoption of the ordinance establishing an amortization period for AVR's plant is unsupported by any rational basis related to the promotion of the public health, safety, morals, or general welfare. Because the city's establishment of an amortization period for a preexisting nonconforming use was a legislative act, we

conclude that the district court did not err in deferring to the city's broad discretion.

II.

AVR contends that the two-year amortization period for its plant is unreasonable. In establishing the length of the amortization period, the city considered the plant's "useful life," a term the Minnesota Supreme Court has used but has not defined. ***Naegele***, 281 Minn. at 501, 162 N.W.2d at 213 (stating only "that the useful life of the nonconforming use corresponds roughly to the amortization period"). The city based its determination of useful life on its conclusion that AVR had recouped its original investment and, to a lesser extent, on the fact that the property has been fully depreciated for income tax purposes. In addition, the city considered the other factors it had adopted by ordinance.

AVR argues that the city acted unreasonably in failing to consider "the remaining useful economic or expected life" in determining the length of the amortization period. ***See, e.g., City of La Mesa v. Tweed & Gambrell Planning Mill***, 304 P.2d 803, 808 (Cal. Dist. Ct. App, 1956) (noting estimated 21 years of remaining economic life as one reason for holding five-year amortization period arbitrary and unreasonable). In ***Naegele***, the supreme court stated only that the underlying issue in determining the length of an amortization period is whether it is reasonable. 281 Minn. at 501, 162 N.W.2d at 213.

In analyzing the reasonableness of an amortization period, courts in some jurisdictions have considered the property owner's recoupment of its original investment. ***See, e.g., Rives v. City of Clarksville***, 618 S.W.2d 502, 510 (Tenn. Ct. App. 1981) (considering length of amortization period in relation to property owner's investment); ***Town of Islip v. Caviglia***, 540 N.E.2d 215, 224 (N.Y. 1989) (determining

reasonableness by examining all facts, including length of amortization period in relation to investment); ***City of University Park v. Benners***, 485 S.W.2d 773, 777 (Tex. 1972) (noting that termination of nonconforming use after amortization period allowing recoupment of investment is not unconstitutional taking).

Courts also have considered whether the property in question has been fully depreciated for income tax purposes in reviewing the reasonableness of an amortization period, although this factor alone has not been held to be determinative. ***See, e.g., Art Neon Co. v. City & County of Denver***, 488 F.2d 118, 122 (10th Cir. 1973) (considering depreciation for tax purposes); ***National Adver. Co. v. County of Monterey***, 464 P.2d 33, 35-36 (Cal. 1970) (holding that where billboards have been fully depreciated for tax purposes, amortization period was not unreasonable); ***Village of Skokie v. Walton on Dempster, Inc.***, 456 N.E. d 293, 297 (Ill. App. Ct. 1983) (concluding that amortization period was reasonable where property was completely depreciated for tax purposes); ***Philanz Oldsmobile, Inc., v. Keating***, 381 N.Y.S.2d 916, 920 (N.Y. App. Div. 1976) (stating that where signs had been fully depreciated for tax purposes, financial loss is nonexistent).

To the extent AVR's contention that the city should have considered the "remaining useful economic or expected life" of AVR's plant is another way of saying that the amortization period should be based on the plant's fair market value or its replacement cost, the argument leads to illogical and contradictory consequences. As one court has recognized:

> [A]pplication of the market-value standard would result in a vicious circle: market value depends on the period of expected nonconforming use, and the period of nonconforming use allowed depends on market value. * * *

> Cost of replacing the nonconforming structure, even with an allowance for depreciation, would also provide an unsatisfactory measure of recoupment. A landowner is not permitted to extend the period of nonconforming use by replacements or improvements because [the owner] would be able to extend the nonconforming use indefinitely * * * . To allow replacement cost as a measure of the recoupment allowed would thus allow unjustified extension of the nonconforming use. Moreover, [it] would ignore the factor of obsolescence, which might be substantial * * * .

Murmur Corp. v. Board of Adjustment, 718 S.W.2d 790, 796-97 (Tex. App. 1986) (citations omitted).

Here, the city used a combination of recoupment of investment and tax depreciation status as factors in determining the useful life for AVR's plant.[1] The record shows that over the past 23 years the plant provided AVR a return of approximately 560% on its investment and that the plant has been fully depreciated for income tax purposes. These two factors provided the city with a reasonable basis to determine the plant's useful life for purposes of establishing an amortization period.

AVR also argues that the city's findings with respect to the factors it adopted by ordinance are not supported by sufficient evidence, claiming that the city virtually ignored the ordinance factors in favor of other factors and considerations. But the record shows that in establishing the amortization

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[1] At oral argument, the city conceded that it considered the tax depreciation status of the AVR plant only as a secondary factor and that recoupment of investment was a primary factor.

period for AVR's plant, the city considered each of the factors in its amortization ordinance and that the city's findings regarding these factors are supported by record evidence.

AVR further contends that in determining the length of the amortization period, the city gave undue deference to the opinions of area residents instead of applying the factors required by the city's ordinance. In support of its argument, AVR cites ***Trisko v. City of Waite Park***, in which this court held that a municipality must base a decision to deny a conditional use permit on "something more concrete than neighborhood opposition and expression of concern for public safely." ***Trisko v. City of Waite Park***, 566 N.W.2d 349, 355 (Minn. App. 1997) (quoting ***Chanhassen Estates Residents Ass'n v. City of Chanhassen***, 342 N.W.2d 335, 340 (Minn. 1984)), ***review denied*** (Minn. Sept. 25, 1997).

This case does not involve denial of a conditional use permit, which is a quasi-judicial determination and therefore subject to closer scrutiny. But even if ***Trisko*** were applied to the city's adoption of the ordinance establishing a two-year amortization period, the record shows that the city's decision was based on more than neighborhood opposition to AVR's plant and expression of concern for public safety. For example, the city found that the quality of life for surrounding residents will increase by allowing the city to improve the general appearance and image of the city. The city also found that amortization of AVR's plant will create redevelopment opportunities that will help satisfy a demand for certain housing needs and increase property values in the immediate vicinity, which, in turn, will increase real estate taxes and benefit the entire community.

AVR further argues that the two-year period is unreasonable because amortization periods should be lengthened "when the amortization is not consistent with the surrounding area or any solid redevelopment plan," noting that the area surrounding the plant is not exclusively

residential. But the record shows that the city's rezoning of AVR's property from I-4 Industrial to R-4 Multifamily Residential is consistent with its plans for the surrounding area.

AVR claims that the two-year amortization period is unreasonable because the ordinance terminates the use of a structure, not just a particular use, and that the amortization period for a structure is generally longer than for a use. But AVR did not raise this issue to the district court, and, generally, this court refuses to address issues not presented to or decided by the district court. ***Thiele v. Stich***, 425 N.W.2d 580, 582 (Minn. 1988). Because the issue is not properly before the court, we do not address it.

Finally, AVR argues that the two-year amortization period is unreasonable because the city was motivated by aesthetic rather than health and safety considerations. But "a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance." ***Naegele***, 281 Minn. at 499, 162 N.W.2d at 212. In addition, the city enacted the ordinance establishing the two-year amortization period for several reasons, including improvement of the general welfare by reducing noise, dust, and traffic.

Because the ordinance establishing a two-year amortization period for AVR's plant reflects the city's consideration of the plant's useful life and an analysis of other relevant factors adopted by the city, the district court did not err in upholding the city's two-year amortization period.

III.

AVR contends that the city's amortization ordinance and its ordinance establishing a two-year amortization period for AVR's plant violate its right to equal protection of the laws. "A municipal zoning ordinance is presumed constitutional. The burden of proving the ordinance is unconstitutional rests

on the party attacking its validity." ***DI MA Corp.***, 562 N.W.2d at 320 (citation omitted).

Under the Equal Protection Clause, "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. ***In re Harhut***, 385 N.W.2d 305, 310 (Minn. 1986). But where the party complaining of the disparate treatment is not a member of a suspect class and the legislation does not infringe on a fundamental right, this court will uphold a municipality's ordinance where it is rationally related to a legitimate governmental purpose. ***Arcadia Dev. Corp. v. City of Bloomington***, 552 N.W.2d 281, 288 (Minn. App. 1996), review denied (Minn. Oct. 29, 1996).

AVR argues that the city is treating it differently from Al's Liquor Bar, arguing that the two are similarly situated. In the 1992 zoning ordinance, the city identified both properties as preexisting nonconforming uses to be amortized. In 1995, the city excepted all existing bars from amortization. But the district court concluded that the city "has not treated similarly situated entities differently." We agree. There are no other ready-mix plants in the city. AVR's plant is a heavy industrial use that causes "significantly more severe and disruptive" amounts of noise and dust than does Al's Liquor Bar. Because AVR has not shown disparate treatment of similarly situated property owners, the district court did not err in concluding that the city has not violated AVR's equal protection rights.

DECISION

Because the city's action was a legislative decision, the district court did not err in deferring to the city's broad discretion to adopt an ordinance establishing a two-year

amortization period for AVR's plant. Additionally, because the ordinance establishing an amortization period for AVR's plant is based on the city's consideration of the plant's useful life and application of other relevant factors, the district court did not err in upholding the city's establishment of a two-year amortization period. Finally, because AVR did not demonstrate disparate treatment of similarly situated property owners resulting from the enactment of the amortization ordinance and the ordinance establishing a two-year amortization period for AVR 's plant, the district court did not err in concluding that there is no equal protection violation.

Affirmed.

Dated: 10/20/98

/s/
Judge Bruce D. Willis

STATE OF MINNESOTA

AFFIDAVIT OF SERVICE

COUNTY OF RAMSEY

METRO LEGAL SERVICES

Mark Miller, being duly sworn, on oath says: that on the 19th day of November, 1998, at 2:30 p.m. (s)he served the attached two copies of AVR's Petition for Review of Court of Appeals Decision Filed October 20, 1998 and Appendix upon Tom Scott, Esq. and Roger Knutson, Esq. therein named, personally at 317 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, County of Dakota, State of Minnesota, by handing to and leaving with Sandy Smith, receptionist, an expressly authorized agent for service for said Tom Scott, Esq. and Roger Knutson, Esq., a true and correct copy thereof.

/s/ Mark Miller

Subscribed and sworn to before me,
November 19, 1998.

/s/ Christine A. Ellingson
Notary Public

Charge $

Re: 15,631-D-1-8

STATE OF MINNESOTA

IN SUPREME COURT

C7-98-516

AVR, Inc.,

Appellant,

vs.

City of St. Louis Park,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for further review filed in the above-entitled matter be, and the same is, denied.

Dated: December 15, 1998

BY THE COURT:

/s/

Kathleen A. Blatz
Chief Justice

SECTION 14:7-4 AMORTIZATION OF CERTAIN USES

A. Purpose

St. Louis Park is a fully developed City and as such, there are certain uses which are no longer compatible with the nature of the community. In general, these uses tend to create noise, traffic, and dust problems and have a negative impact on property values and aesthetics due to the fact they are incompatible with the surrounding area. It is the intent of the City to gradually eliminate those uses which because of their location or manner of operation, create a negative impact on the health and welfare of the neighborhood in which they exist. To the extent practical and consistent with good land use planning and zoning principles, the City has made every effort to accommodate permitting uses in districts where they are less likely to cause negative impact.

In reaching its conclusion to provide for the gradual elimination of all non-conforming uses not permitted in any zoning district in the City, the City Council has weighed the interests of the individual property owners who will be required to gradually terminate their non-conforming use and the health, welfare and safety of the community generally and the surrounding neighborhoods specifically.

B. Registration of Land Uses Required

All owners of property that contain a use not permitted in any zoning district shall register their non-conforming use with the City, within one year

from the effective date of this Ordinance. Property owners are responsible for determining the applicability of this provision to their property.

1. Notice: The City will provide property owners of nonconforming uses subject to the provisions of this Section with written notice that the property must be registered. The City shall also have notice of the registration requirement published in the City's official newspaper within 60 days of the effective date of this Ordinance. The failure of the City to provide a property owner with written notice shall not absolve the property owners from responsibility for registering their property, nor shall it extend the length of the registration period.

2. Registration Process: The property owner shall file a registration application with the Zoning Administrator on a form provided by the City and accompanied by a fee to be determined by the City Council.

   The registration application shall require the property owner to submit pertinent information including, but not be limited to the following:

   a. Name, address, and telephone number of the legal owner of the property;

   b. Name, address, and telephone numbers of any tenants or lessees, along with a copy of lease agreements;

   c. Legal description of the property;

d. Description of the type and nature of the nonconforming use, including a description of the structures and improvements on the property, manner of operation, hours of operation, size of structure, type of construction, age of structure and location of structures on the property;

e. Description of surrounding neighborhood including street patterns and access;

f. Information relating to the length of time the nonconforming use has been in existence;

g. Description of land use within 350 feet of the property;

h. Evidence of the original cost of the property and structures and any subsequent improvements to the structures;

i. A current appraisal of the value of the property and structures;

j. A description of the depreciation method applied to the property for income tax purposes, based on generally recognized accounting principles applicable at the time the property was originally acquired by the owner;

k. The assessed value of the property for property tax purposes;

l. Copies of income tax and financial statements for the past five years;

m. Any additional information the property owner may want to provide that may affect the length of the amortization period.

3. Exceptions: The provisions of this section shall not apply to bars which existed as a principal use upon the effective date of this ordinance.

(Number 3 added by Ord 2024-95 3-6-95)

C. Failure to Register

Failure to register a nonconforming use within one year from the effective date of this Ordinance shall require the owner or tenant to terminate the non-conforming use within six months from the end of the registration period.

1. The City may take any and all action permitted by law to require the termination of the non-conforming use, including but not limited to securing and boarding the property containing the non-conforming use.

D. Determination of Amortization Period

Within ninety (90) days from the time the Zoning Administrator receives a complete registration application, the City shall advise the property owner in writing of the length of the amortization period along with the factors used by the City to determine the amortization period.

1. Meeting with Property Owner: Within fifteen (15) days of receiving a registration application, the Zoning Administrator shall meet with the property owner to review the registration application and whether it is complete. The City shall not undertake an analysis of the registration application until it is complete.

2. Factors in Determining the Length of the Amortization Period: The Zoning Administrator shall consider at a minimum, the following factors in determining the length of the amortization period:

   a. Information relating to the structure located on the property;

   b. Nature of the use;

   c. Location of the property in relation to surrounding uses;

   d. Description of the character of and uses in the surrounding neighborhood,

   e. Cost of the property and improvements to the property;

   f. Benefit to the public by requiring the termination of the non-conforming use;

   g. Burden on the property owner by requiring the termination of the non-conforming use;

h. The length of time the use has been in existence and the length of time the use has been non-conforming.

3. Staff Report Recommending Amortization Period: The Zoning Administrator shall prepare a written report detailing the factors considered in establishing the length of the amortization period. The report shall contain a recommendation to the City Council on the length of the amortization period.

4. City Council to Establish Amortization Period: The City Council shall by ordinance amend the Zoning Ordinance to establish an amortization period for individual land uses not permitted in the City. The amortization period shall commence upon publication of the ordinance establishing the length of amortization period.

E. Non-conforming signs

All non-conforming signs must be brought into compliance with this ordinance or removed within the time established in Section 14:6-2.

F. Non-conforming parking

1. Any land use on any property which contains a non-conforming parking lot or paved area shall not be expanded or intensified unless the property is brought into compliance with the standards contained in Section 14:6-1.2. However, all non-conforming parking lots and paved areas must comply with Section 14:6-1.2

on or before October 31, 1997. In addition to the other penalties provided by law the City may withhold a Certificate of Occupancy for any property not in compliance with this Section.

2. Any land use which does not provide the number of parking spaces required by Section 14:6-1.3 for the amount of parking provided may remain as a non-conformity however, the land use may not be expanded or intensified unless it provides the parking spaces required under this Ordinance for the expansion or intensification. A use will be considered to be expanded or intensified if any of the following occur:

   a. The floor area is increased.
   b. The parking requirement is increased.
   c. The building bulk is increased.
   d. A building addition is constructed.

3. Land uses with non-conforming parking in terms of numbers of stalls shall not be required to provide additional parking to bring the use into compliance if such parking would occupy required yards or bufferyards.

G. Non-conforming bufferyards

If buildings were existing on a parcel of land on the effective date of this ordinance which due to their location, make construction of the required bufferyards impossible, the following reductions may be made in the bufferyard requirements:

1. If the required bufferyard is a "B" and the available bufferyard width is at least 4 but less than 10 feet a bufferyard shall be installed on the available width using the 100% of the required plant units.

2. If the required bufferyard is either "A" or "B" and the available bufferyard width is less than 4 feet, an F1 fence and 50% of the plant units required for each 100 linear feet of bufferyard shall be installed.

3. If the required bufferyard is either "C" or "D" and the available bufferyard width is at least 4 but less than 10 feet, the bufferyard shall be installed on the available width using an F2 fence plus 50 plant units for each 100 linear feet of bufferyard.

   (numbers 1-3 above amended by Ord 1915-93 5-3-93)

4. If the required bufferyard is either C or D and the available bufferyard width is less than 4 feet, an F4 fence shall be installed plus 25 plant units for each 100 linear feet of required bufferyard.

5. If the required bufferyard is either E or F and the available bufferyard width is at least 10 but less than 15 feet, the bufferyard shall be installed on the available width using a berm wall BW1 plus 75 plant units per 100 linear feet of required bufferyard.

6. If the required bufferyard is either E or F and the available bufferyard width is at least 4 but less than 10 feet, the bufferyard shall be installed on the available width using an F6 wall and 50 plant units per 100 linear feet of required bufferyard.

7. If the required bufferyard is either E or F and the available bufferyard width is less than 4 feet, the bufferyard &hall be installed on the available width using an F6 wall plus 25 plant units per 100 linear feet of required bufferyard.

H. Non-conforming lighting.

All site lighting which exceeds the maximum allowable light levels at the property line or where the direct light source is visible from off the site must be modified to comply with Section 14:6-3 or removed from the site within one (1) year of the effective date of this Ordinance.

SECTION 14:7-5.0 APPEALS

With the exception of Section 14:7-3.A.4, the provisions of Sections 14:7-1.1 through 14:7-4 inclusive, are not subject to appeal to the City Council.

Supreme Court, U.S.
FILED
APR 16 1999
OFFICE OF THE CLERK

(2)

No. 98-1482

In the
Supreme Court of the United States
October Term, 1998

AVR, INC.,
a Minnesota Corporation,
Petitioner,

v.

CITY OF ST. LOUIS PARK,
a Minnesota Municipal Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Has a municipality taken property for public use when it requires the owner of valuable residentially-zoned property to terminate the existing non-conforming industrial use by amortization upon recoupment of the owner's investment in that use.

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STATEMENT OF THE CASE

The following facts are intended to correct inaccuracies and omissions in the statement by Petitioner.

Without any citation to the record, Petitioner inaccurately states that the City is "forcing the Petitioner to hold the property without any economically viable use (at least until the property and the surrounding property are ripe for redevelopment)." (Pet. 13-14.) The record in fact shows that the property has a viable economic use for residential development. AVR's own appraiser values the land alone at $260,000.00. (Resp't App. A-17.)[1] AVR's appraiser agrees that the land can be developed as a high density residential use under the current zoning or as a commercial or light industrial use with a zoning change. He states:

> Legally, the site is zoned R-4, multi-family residential district. This zoning represents a change from the sites (sic) prior I-1 zoning as of year end 1992. The new zoning allows for residential development of various dwelling types at densities of up to 30 units per acre. Some uses that would apply include two family dwellings, apartments, condominiums, as well as open space, and community facilities. We find that from a legal standpoint the subject site could be developed within any one of these allowable uses under current zoning. The economic factors that relate to the subject are fair to good. The area is heavily developed to the south with various industrial developments, which

[1] The Market Value Appraisal was submitted to the Minnesota District Court as Exhibit 5 of the stipulated record.

> would tend to discourage residential development so near to such an area. However, there is only a limited availability of vacant land in St. Louis Park which bodes well for the development of available vacant land sites in the area.
>
> Another support to the residential zoning for this site is the somewhat stronger market for residential properties than for either industrial or commercial construction. However, the site could yet be developed as either a commercial or light industrial development of higher quality with a zoning change, due to the significant presence of such developments in the area fronting Louisiana Avenue.
>
> * * *
>
> In conclusion, our analysis indicates that the site as vacant avails itself to almost all logical, physically possible multi-family residential type development in accordance with the sites (sic) current zoning, though the site could yet avail itself to higher quality commercial or light industrial development with a zoning change.

(Resp't App. A-18 to A-19.)[2]

Petitioner states that AVR's 2.6 acre parcel is surrounded by commercial and light industrial uses, citing to App. A-3. (Pet. 3.) There is no support for this general statement at

[2] The April 20, 1995 supplemental letter to the appraisal was submitted to the Minnesota District Court as Exhibit 6 of the stipulated record.

App. A-3 or elsewhere. The City's unchallenged Findings of Fact relating to the surrounding neighborhood state:

> **Factor (4): Description of the character of and uses in the surrounding neighborhood.**
>
> 15. AVR is surrounded by a stable single-family residential neighborhood to the east, three businesses of primarily office or quasi-industrial character to the north, none of which apparently involve industrial activity similar to AVR's use and in any event do not involve outdoor processing activities; a vacant building that formerly was used by a security company, immediately to the south; a multiple-family residential neighborhood to the west across Louisiana Avenue; and, to the southwest a restaurant that serves both the single-family residential neighborhood to the east of AVR as well as the multiple-family residential neighborhood to the west.
>
> 16. Other existing, small commercial uses in the vicinity do not present the intense conflicts with the neighborhood and surrounding residential development and redevelopment that the AVR ready-mix facility does.

(App. A-15.)

Petitioner also states that "[t]he City confirmed that there was no redevelopment plan for the property or the surrounding area," citing to App. A-27 to A-28. (Pet. 6.) There is no support for this statement. The City's Findings of Fact relating to this topic state:

13. At present, the area that includes AVR is in the process of redeveloping, and the ready-mix facility is now surrounded by Residential and Commercial Use Districts that contain the Park Tavern Restaurant, the "3300 on the Park" condominium complex, the Oak Park Village townhomes, and a single-family neighborhood that includes a small City park and a public library. In addition, redevelopment plans for the area immediately surrounding AVR emphasize construction of additional multiple-family residential housing.

14. The ready-mix use is fundamentally incompatible with existing and planned uses and with the City's zoning and Oak Hill Neighborhood Comprehensive Plan.

(App. A-14 to A-15.)

ARGUMENT

I.

THE FEDERAL QUESTION SOUGHT TO BE RAISED WAS CONCEDED BY PETITIONER AND NEVER ARGUED IN STATE COURT

Petitioner asks this Court to determine whether a "lawful non-conforming use *** can be terminated through amortization." (Pet. i.) In its reply brief to the Minnesota Court of Appeals, Petitioner stated:

> There is no dispute that, as a non-conforming use, AVR may someday be amortized out of existence.

(Resp't App. A-6.)

In state court Petitioner challenged the reasonableness of the amortization period. Petitioner now steps back, changes its legal theory and asks this Court to determine whether a non-conforming use can be terminated by amortization, the exact point Petitioner expressly conceded in state court.

II.

REQUIRING THE OWNER OF VALUABLE RESIDENTIALLY-ZONED PROPERTY TO TERMINATE THE EXISTING NON-CONFORMING INDUSTRIAL USE BY AMORTIZATION IS NOT AN UNCONSTITUTIONAL TAKING OF PROPERTY FOR PUBLIC USE

Amortization is a well-recognized regulatory tool which requires a property owner to terminate a non-conforming use at a future date. As in this case, the reasonableness of the

amortization period generally considers the owner's recoupment of investment, together with a general balancing of the public benefit versus the private loss. Every federal circuit that has addressed amortization has found such provisions to be facially valid. *See Outdoor Graphics, Inc. v. City of Burlington, Iowa*, 103 F.3d 690 (8th Cir. 1996); *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987); *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985); *Art Neon Co. v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

The Supreme Court has long recognized a municipality's right under its police power to terminate the existing use of property so long as the owner is not denied all economically beneficial use of the land. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the town adopted an ordinance prohibiting any excavation below the water table. The effect of this safety ordinance was to completely prohibit the mining of sand and gravel on appellant's property, a use to which the property had been put continuously since 1927. This Court upheld the regulation:

> If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.

Id. at 592. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 133-34 (1978) (confirming that use need not be common law nuisance to be prohibited); *Miller v. Schoene*, 276 U.S. 272 (1928) (upholding destruction of diseased cedar trees to prevent damage to apple orchards); *Hadacheck v.*

Sebastian, 239 U.S. 394 (1915) (upholding ordinance which terminated an otherwise lawful brickyard; city council had reasonably concluded that the brickyard was inconsistent with neighboring uses). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023-24 (1992) (*Hadacheck*, *Miller*, and *Goldblatt* were progenitors of this Court's more contemporary statement that no taking occurs if the regulation substantially advances a legitimate state interest).

Petitioner's reliance on *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Lucas* is entirely misplaced. *Nollan* and *Dolan* involved exactions. The property owners were required to convey a property interest to the public as a condition of approval. *Lucas* involves a regulation depriving land of all economically beneficial use, with the Court upholding such a complete prohibition only if the proscribed uses were never part of the owner's "bundle of rights" based upon restrictions that background principles of the state's law of property and nuisance place upon land ownership. Here, it is undisputed that the property has a wide array of economically beneficial uses.

CONCLUSION

Petitioner did not raise the question in state court that it now seeks to have this Court decide. Petitioner conceded that amortization is constitutional, choosing to challenge the reasonableness of its application in this situation.

This Court has consistently upheld the right of a municipality in the exercise of its police power to require the termination of the current use of property so long as the land has a beneficial economic use. Every federal circuit court addressing amortization has found the regulation to be facially valid.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATE OF MINNESOTA
IN COURT OF APPEALS
CASE NO. C7-98-516

AVR, Inc.,
a Minnesota corporation,

Appellant,

v.

City of St. Louis Park,

Respondent.

APPELLANT'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

The City makes essentially four points in its Brief, two of which AVR agrees with and two of which it does not. Those four points are:

1. The amortization of non-conforming uses is an appropriate and recognized municipal planning tool. Resp. Brief pp. 15-18.

2. Tax depreciation and recoupment of investment are factors considered by some courts in determining the length of the amortization period. Resp. Brief pp. 19-25.

3. As a non-conforming use, AVR enjoyed a monopolistic position which justifies a shorter amortization period. Resp. Brief pp. 20, 25-26.

4. The City established that AVR generates unacceptable levels of dust, noise and traffic. Resp. Brief pp. 26-31.

With respect to the first two points, AVR was quite candid and included a lengthy section in its Brief, about the availability of amortization as a planning tool and the emphasis placed by some courts on tax depreciation and recoupment of investment. In particular, the Texas courts have given preeminent importance to tax depreciation and recoupment of investment and, if this Court is similarly inclined, then there is nothing further to discuss.

However, AVR reiterates that for the analysis to rest solely upon tax depreciation and recoupment of investment

ignores the overarching consideration cited in all treatises and articles, and the vast majority of jurisdictions, addressing amortization: the public benefit versus the private loss. This overarching consideration militates against a simplistic approach and rather mandates the application of many factors on a case by case basis. Such an analysis in this case establishes that AVR's St. Louis Park facility is situated in an area that is still primarily commercial/industrial in nature and that the City's ultimate plan to transform the area to predominantly residential is many years away.

With respect to the City's third and fourth points, the record does not support a finding either that AVR enjoys a monopoly status as a non-conforming use or that AVR is a nuisance. The City's own evidence establishes that AVR faces stiff competition in the market serviced by the St. Louis Park facility. With respect to the numerous City findings about noise, dust and traffic generated by AVR, the City, as did the district court, entirely ignores the evidentiary record. The plant is admittedly no architectural wonder, but it does have a permit from the Minnesota Pollution Control Agency which regulates plant emissions and it does meet statutory noise standards. The City's nuisance allegations really amount to a purely aesthetic complaint which, while having some legitimacy, could easily be ameliorated by less severe means than amortization such as berms, blacktopping, landscaping and the like. To entirely eliminate an established business because of the subjective complaints of a handful of residents completely ignores the requirement that, first and foremost, amortization take into consideration the public benefit versus the private loss.

II. AMORTIZATION AS A PLANNING TOOL

There is no dispute that, as a non-conforming use, AVR may someday be amortized out of existence. What is critical is the framework that will be established by this Court, now 30 years after Naegele, for determining the length of the amortization period. AVR repeats the basic test:

> The basic test involves balancing the public gain against the private loss. Indeed, some commentators describe the courts as willing to consider "any circumstances bearing upon a balance of the public gain against the private loss." Generally, the relevant considerations include the nature of the present use, the length of the amortization period, and the present characteristics of, and foreseeable prospects for, development of the area. Courts consider all of these factors only in determining the "true issue" of whether beneficial effects on the community resulting from discontinuance of the use will outweigh the losses to the individual land owner.

"Amortization Periods For Non-Conforming Uses," Journal of Urban and Contemporary Law, Volume 34: 99, p. 116 (1988).

Although cosmetically the City did adopt a nine factor test and did generate a lengthy record, as discussed below its basis for a two year amortization period does not weigh the public gain against the private loss.

III. TAX DEPRECIATION/RECOUPMENT OF INVESTMENT

Aside from the fact that tax depreciation and recoupment of investment are not even among the nine factors in the City's

Amortization Ordinance (A1629), this factor depends primarily on what even the Internal Revenue Services recognizes is a tax fiction:

> The concept of useful life is de-emphasized where depreciation is computed under depreciation systems (such as ADR, ACRS, and MACRS) because specific recovery periods are provided by statute that may be unrelated to, or shorter than, the estimated useful life of property.

1998 CCH Standard Federal Tax Reporter, Vol. 3, ¶ 11,005. Thus, for example, if nonresidential real property were placed in service on May 12, 1993, the recovery period for the cost of such property under the straight-line method would be 31.5 years whereas, if the same property were purchased a day later on May 13, 1993, the recovery period would be 39 years. CCH Standard Federal Tax Reporter, 1997 Depreciation Guide. Those jurisdictions relying heavily upon tax depreciation and recoupment of investment to the exclusion of other factors have rejected the more thoughtful and reasoned public gain versus private loss analysis which is aimed at reflecting the practical realities of amortizing a business out of existence. AVR urges this Court to reject a simplistic approach utilizing only one or two factors. Rejecting this approach is particularly appropriate in this case where tax depreciation and recoupment of investment were not even among the nine factors set forth in the City's amortization ordinance, but were obviously afterthoughts.

IV. AVR DOES NOT HAVE A MONOPOLY POSITION IN THE MARKET

The City adopted a two year amortization period for AVR's St. Louis Park facility pursuant to Ordinance No. 2039-95 which amends § 14:7-4 of the St. Louis Park Zoning Ordinance. (A2549). Findings 25-28 (A2556) in support of the two year period assert that AVR has enjoyed a "monopolistic market position," the benefit of which significantly mitigates the private loss it will incur as a result of losing the facility.

However, the unrebutted testimony submitted by AVR was that, if its St. Louis Park facility is lost, it cannot compete with Cemstone's concrete plant in western Minneapolis and Model Stone's concrete plant at Lyndale and Crosstown. (A1787). Thus, although caselaw *suggests* that a non-conforming use may enjoy monopoly status, AVR's unrebutted evidence to the contrary overrides such caselaw.

The City's Findings 26 and 27 imply that AVR will either be able to service the market area serviced by the St. Louis Park plant through its other facilities[1] or that AVR did not undertake satisfactory efforts to relocate to another location within the market area. Again, AVR submitted lengthy testimony and documentary evidence from its experts that market area is limited by the delivery time of concrete (which is perishable) and that no other sites were available for relocation. See, Study of AVR St. Louis Park Relocation, A0347-A0356, prepared by John Voss who has 32 years of municipal planning experience. Mr. Voss and another AVR expert, Dale Runkel, testified that they called and personally

---

[1] The City's Brief at p. 24 cites to A1777 in support of its assertion that "AVR has a network of ready-mix plants in the western half of the metropolitan area...." The cite does not contain anything on that subject.

met with appropriate officials of municipalities located within the market area served by AVR's St. Louis Park facility and determined that there were no relocation sites available. (A0352, A1786, A0643, A1788, A1836). Mr. Runkel spent 45-50 hours meeting and talking to city staff members and viewing properties. (A1836). AVR cannot relocate and cannot service the market area from its other plants. (A1885-A1897).

There is no basis for any conclusion other than that, far from having a monopoly position, AVR will lose the market area serviced by the St. Louis Park facility.

V. AVR IS NOT A NUISANCE

City Findings 8, 9, 10, 19, 20, 22 and 23 all relate to the reduced noise, dust and traffic that will supposedly be occasioned by the elimination of AVR's St. Louis Park facility. The only evidence cited by the City in support of these Findings is complaints from a condominium complex to the west of the plant called 3300 On the Park.

The City fails to point out that homeowners to the east of the plant, who are as close in proximity as the residents in 3300 On the Park, signed a petition which states:

> We the undersigned have experienced no problems with AVR under normal working conditions. We are offended the City is trying to remove a viable business.

A2528. To the extent that any weight could be given to the subjective complaints of residents, the weight of such evidence is offset by other residents who clearly appreciate AVR's presence in the community.

AVR submitted to the City its emission permit from the MPCA. (A1877). Further, noise levels are controlled by statute. Minn. Rules § 7030.1040, promulgated by authority of Minn. Stat. § 116.07, Subd. 4.

AVR's aggregates are washed prior to delivery to the St. Louis Park plant and the concrete is premixed at the plant before it is loaded in the truck so there is nothing in the concrete mixing and loading process that would generate dust. (A1887-A1888). Any dust generated by trucks entering and leaving the plant could be eliminated by blacktopping the yard, AVR pointed out during the hearings that there are other industrial uses in the immediate area which create dust but that no effort was undertaken by the City to determine the source. (A1882). In fact, the City conducted no traffic count, no dust and/or air pollution counts and no noise testing. (A1776).

Finally, the intersection of Highway 7 and Louisiana Boulevard is a heavily trafficked area. Mr. Voss testified that Louisiana Boulevard generates 10,000 trips a day, of which AVR generates only 75 round trips a day. (A1882). A 79 unit apartment complex, which the City maintains would be appropriate for the site, would generate 500 trips a day. (A1784).

Empirical data could have been collected by the City but it failed to do so. Neighborhood complaints cannot support the City's Findings in the face of the weight of AVR's evidence.

VI. AVR'S LOSS IS SUBSTANTIALLY GREATER THAN ANY BENEFIT TO THE PUBLIC FROM ELIMINATION OF AVR`S PLANT AT THIS TIME

The City's Findings 19 through 23 purport to set forth the benefit to the public from termination of AVR's non-conforming use. Aside from those Findings essentially stating that a nuisance will be removed, Finding 21 states:

> 21. Redevelopment activities may accelerate after the termination of AVR's non-conforming use, and may make the property available for different uses consistent with the City's Comprehensive Plan and the zoning ordinance.

(A2555).

The City asserts throughout its Brief that removal of AVR's plant is needed before redevelopment of the area as high density residential can continue. This simply is not an accurate description of what must occur before residential development continues. There cannot be any dispute that AVR's St, Louis Park facility is located in a predominantly industrial/commercial area. Appellant's Brief at pp. 35-36 describes the industrial/commercial uses in the area. See also, Shenehon Appraisal at A0261 and the list of 34 businesses surrounding AVR at A0704.[2] AVR's 2.5 acre parcel is sandwiched between other industrial or commercial uses which will also have to be eliminated before redevelopment can begin. Mr. Voss went door-to-door and spoke with many of the owners of the industrial/commercial uses in the area who have not been advised they will have to leave and who do not intend to terminate their businesses for a long time. (A1840-A1841). Mr. Voss testified that the City cannot stick an apartment complex in the midst of these other uses. (A1840-A1841).

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[2] AVR miscited this list in its initial Brief at p. 36.

Consider the following colloquy that occurred at the August 2, 1995 Planning Commission meeting:

> Commissioner Morris: Okay. Madam Chair, I then have another question regarding the two year amortization time is: assuming that the ordinance passes and we're two years in the future with a closed plant, as I think it was Mr. Voss pointed out, the entire area appears to be of a commercial nature. And I guess I question the expectation of a -- of a developer coming in and developing the AVR site into a residential use, sandwiched, as it would be, between a bowling alley, nightclub, and other commercial uses.
>
> And I guess I am wondering what -- what the plan is, other than what the comprehensive plan states for development of this area. Is there an active plan to go in and acquire other lands to create a development park or residential park of some nature or are we going to be, in two years, just looking at a vacant piece of land that is trying to be marketed?
>
> Mr. Harmening: Madam Chair, Commissioner, the property is -- or property in and around Apple Valley Red-E-Mix is currently zoned residential and was guided and zoned as such several years ago as a part of our comp plan update as well as our zoning ordinance update. And that amendment, if you will, or changes was done as part of a planning process which concluded that multi-family residential was the appropriate use for the properties in question.

> At this point in time, we do not have an active plan, if you will, or a development agreement with a developer for the redevelopment of those parcels. But it's our expectation that those types of efforts would be taken in the future. What the timeline is of that I can't speak to right now.

(A1851).

Commissioner Morris' question encapsulates the defect in the City's argument about redevelopment and Mr. Harmening's (the City planner) answer exposes the fallacy of the City's claimed need to terminate AVR's non-conforming use immediately. This is not a case, like Naegele was, where a city needs to eliminate the last or one of the last industrial/commercial uses in what is an otherwise exclusively residential area. The reality is that elimination of AVR's plant would leave vacant land, producing neither income for the landowner or tax revenue for the City, which would remain vacant for years.

Thus, the *only* ostensible benefit to the public deriving from the elimination of AVR's plant would be to calm the aesthetic sensitivities of a very small minority of people relative to the overall uses in the area. Certainly, the industrial/commercial users have no objection to AVR's continued presence and the handful of resident objections are countered by at least as many residents who are "offended" by the City's elimination of AVR's plant. This supposed benefit is weighed against AVR's loss of a revenue generating plant which services a market segment that cannot be reached by AVR's other facilities and which cannot be relocated.[3] Again, the aesthetic complaints could be ameliorated through

[3] Even if relocation were possible it would cost AVR $1.5 million to $1.8 million. (A0478).

screens or berms, blacktopping, further limiting hours of operation, landscaping, limiting the number of trucks parked in the yard and other similar means. There is no support or justification for a two year amortization period utilizing the public benefit versus private loss analysis.

Someday, elimination of AVR's plant will be appropriate. Now is not that time. If the Court cannot determine from the record what a reasonable length of amortization should be, AVR submits that a remand of this matter back to the City for submission of evidence on the timing of redevelopment of the area would be appropriate.

VII. CONCLUSION

> The City's opening quote in the Argument section of its Brief is taken from Naegele:
>
> The continued presence of preexisting non-conforming commercial uses within these residential districts may reasonably be found to vitiate the effectiveness of the entire comprehensive municipal plan.

162 N.W.2d at 215. No such danger is posed in this case by the continued presence of AVR's St. Louis Park facility. The effectiveness of the City's comprehensive municipal plan, at least as it relates to the area surrounding AVR's plant, depends entirely upon the unplanned and unspecified timing of the area's transformation from what are now predominantly industrial/commercial uses to residential uses. When that timing is set in concrete, the elimination of AVR's plant will be a true benefit to the City.

A court will often find the development of the area has not yet reached the point where termination of the non-conforming use is reasonably necessary to serve the public welfare.

"Amortization Periods for Non-Conforming Uses," Journal of Urban and Contemporary Law, Volume 34:99, p. 113 (1988). The commentary to the American Land Institute Model Land Development Code, Article IV suggests that a city should order the discontinuance of an existing use only where a definite plan has been established for the future development of the area. ALI, A Model Land Development Code, pp. 150-58 (1976). AVR submits that this Court should establish such a rule in this case.

Dated: June 5, 1998.

SIEGEL, BRILL, GREUPNER, DUFFY & FOSTER, P.A.

By: /s/

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MARKET VALUE APPRAISAL

Apple Valley Red-E-Mix

St. Louis Park, Minnesota

December 15, 1993

93238

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Exhibit D

SUMMARY OF SALIENT DATA - Continued

Value Estimated By:	
Cost Approach:	$845,000
Sales Comparison Approach:	$1,100,000
Income Capitalization Approach:	$790,000
Final Value Estimate Composed of:	
Land Value:	$260,000
Equipment Value:	$437,000
Building Value:	$203,000
Total Value:	$900,000

SHENEHON
COMPANY
Real Estate & Business Valuations

April 20, 1995

Mr. Anthony J. Gleekel
Siegel, Brill, Greupner & Duffy, P.A.
1300 Washington Square
Minneapolis, MN 55401

RE: SUPPLEMENTAL LETTER TO OUR APPRAISAL OF THE APPLE VALLEY RED-E-MIX PROPERTY DATED DECEMBER 15, 1993

Dear Mr. Gleekel:

As counsel for the Red-e-Mix property in St. Louis Park, you recently informed us of a delay in the application related to the subjects amortization of non-conforming uses with the City. It was further our understanding that the appraisal we have conducted was related to this application. Pursuant to your request and in light of the application delay, the purpose of this letter is to address and clarify a few matters within our appraisal report.

First, the zoning for the subject site had been changed since the year end 1992 to R-4, multi-family residential. We had reported the zoning according to its prior zoning as I-1, light industrial district. Because of this correction the paragraphs on page 43 should read as follows:

"Legally, the site is zoned R-4, multi-family residential district. This zoning represents a change from the sites prior

I-1 zoning as of year end 1992. The new zoning allows for residential development of various dwelling types at densities of up to 30 units per acre. Some uses that would apply include two family dwellings, apartments, condominiums, as well as open space, and community facilities. We find that from a legal standpoint the subject site could be developed within any one of these allowable uses under current zoning. The economic factors that relate to the subject are fair to good. The area is heavily developed to the south with various industrial developments, which would tend to discourage residential development so near to such an area. However, there is only a limited availability of vacant land in St. Louis Park which bodes well for the development of available vacant land sites in the area."

"Another support to the residential zoning for this site is the somewhat stronger market for residential properties than for either industrial or commercial construction. However, the site could yet be developed as either a commercial or light industrial development of higher quality with a zoning change, due to the significant presence of such developments in the area fronting Louisiana Avenue. Because of the concentration of industrial properties already in the area, land values for the subject site would tend not to be any greater for residential development than for industrial, and so from an economical viewpoint of the underlying vacant land industrial development may yet provide the greatest value to the site.

In conclusion, our analysis indicates that the site as vacant avails itself to almost all logical, physically possible multi-family residential type development in accordance with the sites current zoning, though the site could yet avail itself to higher quality commercial or light industrial development with a zoning change."

The new R-4 zoning additionally affects our discussion of zoning on page 30 of the report.

With regard to the highest and best use as improved, we are additionally of the opinion that the subject site currently developed as a cement production facility currently provides the greatest contribution of value to the subject land site. The scarcity of concrete production facilities within the metropolitan area creates a significant level of demand for land sites where such developments can occur, contributing a significant premium to the underlying land value. Therefore from the standpoint of physical and economic characteristics, the highest and best use for the subject land site as improved would be for its continued use as a cement production facility.

Second, our reference to the subject property as a hotel on page 63 was a typo and should refer to the existing property as an industrial property, or concrete production facility. Third, the Cost Approach to Value in the Final Analysis and Reconciliation Section on page 69 should total $845,000 rather than $810,000. All other final values reported are correct.

None of the changes we have identified in this supplemental letter impact on our conclusions of market value for the subject property. If you have any additional questions please contact us.

Thank You,

SHENEHON COMPANY

/s/
William C. Herber
Vice President

cc: Mr. Robert Strachota